# CONTEMPORARY RELIGIOUS JURISPRUDENCE

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A

TREATISE

ON

# CONTEMPORARY RELIGIOUS JURISPRUDENCE

by
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of the Illinois Bar

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# PREFACE

The purpose of this treatise is to clarify and state the civil and criminal legal aspects of the major polemical tenets of fortune telling, faith healing and pacifism. The conflict of these tenets, particularly in their public expression in actual practice with respect to public morals, public health, public welfare and national safety will always be one of the most important and pressing legal problems which prevail in any civilization. These tenets, one or more, and in various forms, are exploited by most, if not by all, of the contemporary sects.

The problems which have been engendered by adherents of these tenets, a large proportion of whom are religious zealots, especially during times of war, epidemic and national crisis, is a matter of grave public concern. Thus, if they possessed the unbridled power, these zealots, under the cloak of religion, if pacifists, would strip the nation of its armed might, even in the face of invasion; if faith healers, would repeal all medical and sanitary legislative safeguards, and expose the nation to the menace of epidemics of infectious and contagious diseases; if fortune tellers, would abrogate the laws against speculation and false pretenses, and thrust the nation into a maelstrom of archaic superstitions and frenzied speculations.

Therefore, Law, with its consequence in Justice, must act as the bulwark of Society against the onslaughts of those who would use religion as a sword to gain their fanatical desires and ends. Hence, this treatise as a contribution towards a practical understanding and solution of this problem of the conflict of these tenets with the public welfare, health, morals, and safety, and the absolute necessity of imposing and enforcing legal restrictions and limitations upon the practice of these tenets.

THE AUTHOR

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# CHAPTER I

## I. Fortune Telling, Legal Aspects

### A. Introduction

**1. Scope.**—This chapter deals with the criminal and civil legal aspects of fortune telling. The criminal aspects of fortune telling concerns itself with criminal prosecutions of various fortune tellers under fortune telling statutes, medical practice acts, for obtaining money under false pretenses, and for use of the mails to defraud. The civil aspects of this tenet covers the legal rights, remedies and liabilities of fortune tellers.

**2. Definitions**

**a. Fortune Telling.**—"The making a practice of foretelling or pretending to foretell future events or engaging in the practice of foretelling events and the prophecy of the future." [1]A system of metaphysical speculation.[2] Divination.

**b. Fortune Teller.**—One who makes it his practice or business to tell, predict or reveal future events in the life of another through some professed faculty of penetrating, or specific means of calling up, the secrets of the future.[3] Diviner.

**3. History**

**a. Biblical.**—"The prophets and seers of the Old Testament were not 'fortune tellers,' because . . . fortune telling (was) prohibited as far back as the Book of Deuteronomy (c. 18, vs. 10-12), where . . . it (is) written: 'Neither let there be found among you any one . . . that consulteth soothsayers, or observeth dreams and omens, neither let there be any wizard nor charmer nor any one that consulteth pythonic spirits, or fortune tellers, or that seeketh the truth from the dead. For the Lord abhorreth all these things, and for these abominations he will destroy them at thy coming.' And the Apostle Paul . . . not only condemned witchcraft and fortune telling by the method of summoning departed spirits, . . . but, . . . he had very decided views against women[4] acting as prophets or ministers."[5]

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1. 23 American Jurisprudence 711.
2. McMasters v. State, 21 Okla. Cr. 318, 323, 207 Pac. 566 (1922).
3. People v. Adams, 32 N. Y. Cr. R. 326, 342 (1914).
4. Most fortune tellers are women.
5. People v. Ashley, 172 N. Y. S. 282, 283 (1918).

**b. Early English Statutes.** — Blackstone's Commentaries[6] states that a "sixth species of offense against God and religion of which our ancient books are full, is . . . the offense of witchcraft, conjuration, inchantment or sorcery. . . . The civil law punishes with death not only the sorcerers themselves, but also those who consult them (Cod. 1.9, c. 18), imitating in the former the express law of God (Exod. xxii, 18), 'thou shalt not suffer a witch to live.' And our own laws, both before and since the (Norman) conquest[7] have been equally penal; ranking this crime in the same class as heresy, and condemning both to the flames. . . . Our forefathers were stronger believers, when they enacted by statute 33 Henry VIII, c. 8 (1541),[8] all witchcraft and sorcery to be felony without benefit of clergy;[9] and again by statute 1 Jac. I, c. 12

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6. Cooley's Blackstone (1889), Vol. 2, Book IV, Ch. VI, p. 1257, 8.
7. "The laws of (England). . . . about the year 900, class witches and sorcerers with perjurors and murderers, who are ordered to be driven from the land, with the alternatives of reforming, being executed, or paying heavy fines. This provision was constantly repeated by the succeeding monarchs until the time of Canute. The laws of Athelstan decreed that when death was caused by lyblac (witchcraft), and the perpetrator confessed as much, he should pay with his life. If he did not confess he underwent the triple ordeal (hot water and the glowing iron). . . . Edward the Elder, towards the middle of the tenth century decreed that lyblac was to be punished by perpetual excommunication, unless the offender repented. . . . Burning (was regarded). . . . as the appropriate punishment for sorcerers. . . . At the end of the thirteenth century, the (Catholic) Church began to prosecute those suspected of witchcraft and sorcery (regarding it). . . . among the most henious of crimes. . . . (The) ecclesiastical courts (would). . . . try those accused of sorcery, but, on condemnation, the sorcerer was turned over to the King's Court (for the execution of) . . . the death sentence. . . . During the fourteenth century the temporal law in England was not very severe upon sorcery. With the fifteenth century, however, came a change. A witch could now be tried and burned under the statute against heretics, and in 1406 Henry IV empowered the Bishop of Norwich to arrest sorcerers and witches and keep them in prison after conviction until further order." Witchcraft in English Law, Law Times, Vol. 158, p. 356 (1924).
8. "This Act makes it a felony to practise or cause to be practised conjuration, witchcraft, enchantment or sorcery, to get money; or to consume any person in his body, members, or goods; or to provoke any person to unlawful love; or for any other unlawful purpose; or for the despite of Christ or lucre of money dig up or pull down any cross, or to declare where goods stolen be." History of the Criminal Law of England (1883), Stephen, Vol. 2, p. 431.
9. "Upon Edward VI's accession this (Henry VIII) act, together with all others of Henry VIII's reign which created new felonies, was repealed, and no further legislation on the subject took place till 1562, when was passed 5 Eliz. c. 16. This was one of several acts which revived acts of Henry VIII, repealed by

(1603),[10] that all persons invoking any evil spirit or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm or inchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasures, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offense, and death for the second. These acts continued in force till lately to the terror of all the ancient females in the kingdom; and many poor wretches were sacrificed thereby[11] to the prejudice of their neighbors, and their own illusions; not a few having, by some means or other confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having . . . enacted by statute 9 Geo. II, c. 5 (1736)[12] that no prosecution shall for the future be car-

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Edward or by Mary. It recites the act of Henry VIII, its repeal, and the subsequent increase in witchcraft, and makes it a felony without benefit of the clergy (1) to use, practise or exercise any invocations or conjurations of evil or wicked spirits to any intent whatever. (2) To use, practise or exercise any witchcraft, enchantment, charm, or sorcery whereby any person happens to be killed or destroyed. It also provides that everyone shall be liable to a year's imprisonment and six hours' pillory, and on a second offense to be a felon without clergy, who uses any witchcraft, enchantment, etc., whereby any person happens to be wasted, consumed or lamed in his body or member, or whereby any goods or chattels of any person are destroyed, wasted, or impaired. This act increases the severity of Henry VIII's act as to invocations of spirits, but diminishes it as to witchcraft by other means." Ibid. Vol. 2, p. 431, 2.

10. King James I was very much interested in witchcraft, and was the author of a book entitled "Daemonologia."

11. The defendant claimed that he was bewitched by Mrs. M., and as a result he vomited pins, became speechless, could not eat, was affected with diseases, and that he became freed from this witchcraft only by scratching Mrs. M. until she bled. This accusation caused Mrs. M. to be tried as a witch. She was acquitted, but suffered injury at the hands of the rabble. Later the defendant was indicted as a cheat and imposter. At the trial, the evidence showed that the defendant carried a package of pins in one of his pockets, that he had eaten and drunk to excess during his alleged fast, and that he had scratched another woman who had been substituted for Mrs. M. The jury found the defendant guilty without leaving the court room. King v. Hathaway, 12 Mod. R. 556, 14 State Tr. 639 (1702).

12. This statute is still in force in England, and has been held to apply in cases where the fortune teller pretends to call up good or evil spirits as well as animal spirits. Rex v. Duncan, 113 L. J. (K. B.) 411, L. R. K. B. (1944) 713.

ried on against any person for conjuration, witchcraft, sorcery or inchantment. But the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in pillory."

4. **Conflict with Public Morals.**—Because fortune telling is not based upon ascertainable facts or reason, the predictions of fortune tellers frequently cause public mischief in the demoralizing and perverting effects on the minds, as well as on the lives and happiness of those members of the community who, because of their credulous and superstitious nature, believe in the claims of fortune tellers.[13] For this reason, as well as others, fortune telling, from Biblical times to the present day, has been sternly frowned upon by Society as a species of hypocrisy, secular, legerdemain, fraud, public nuisance,[14] nefarious practice,[15] and mischievous nonsense[16] which it sought to suppress as a criminal offense. In a brilliant exposition of the strong religious taboos against fortune telling, Judge Giaccone in a New York case[17] pointed out that "religion, in the generally accepted sense, has surrounded the realm of the dead with an impenetrable wall, and with many taboos, not only because death is so totally final for all human relations but also because it is believed that an attempt to communicate with the dead would lead to madness and would trifle with the Divinity. . . . It was because he was a man of religious faith that the poet, Dante Alighieri, in the XXth Canto of the Inferno, relegates to the eternal damnation of hell the augurs and necromancers, who had been guilty of sacrilege in trying to divine the future, with their heads reversed on their shoulders; he condemns them to trod forever in the gloomy realms of hell, always looking backward as the rest of the body moves forward. . . . There

13. "Suppose a woman who did believe (in fortune telling) were told (by a fortune teller) that her husband or son was going to die soon, one can imagine the effect it would have on her." Stonehouse v. Masson, 2 L. R. K. B. (1921) 818, 825.
14. State v. Hatfield, 87 N. J. L. 124, 126, 93 Atl. 677 (1915).
15. Rex v. Zillah, So. Africa L. R. (1911) C. P. D. 643, 647.
16. Fortune telling "is well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and, on the other, to assist the projects of the needy and of the adventurer." Lyon v. Home, L. R. 6 Eq. 655, 682 (1868).
17. People v. Miller, 46 N. Y. S. (2d) 206, 208-9 (1943).

have always been some people who sought refuge in prophecy in an effort to communicate with the dead. Men, driven by exaggerated ambitions[18] or by excessive fear, have always sought to scrutinize the face of the morrow and sought assistance of those who were gifted in that alleged faculty. We have the Witch of Endor, the Pythoness of the Oracle at Delphi, the Cumaeam Sybil, of the ancient World, and throughout medieval times and even to the present days, not only common mortals but monarchs and great leaders have, like Macbeth, marched to the uncertain ventures of the morrow driven by the eerie cue of a prophecy. At one time, it was a general belief; we now consider it a superstition."

**B. Criminal Aspects.**—Fortune tellers have been convicted of criminal violations under fortune telling statutes, medical practice acts, for obtaining money or property under false pretenses, and using the mails to defraud.

**1. Fortune Telling Statutes**

**a. In General.**—Practically all of the states, as well as all of the English speaking countries, have fortune telling statutes which are predicated and surprisingly similar to the old English statute, 39 Elizabeth c. 4, 1597, sec. 2, which declares that all "idle persons . . . fayning themselves to have knowledge in physiognomye palmestry or other like crafty scyence, or pretending that they can tell destenys, fortunes or other such like fantastically imagynacions . . . shall be taken adjudged and deemed rouges, vagabonds and sturdy beggers." The present day statutes,[19] for most part, include mention of astrology, clairvoyancy, mesmerism, pretending to tell where lost or stolen goods or treasures can be found, and make fortune telling a misdemeanor, particularly if a fee, gift or donation is received by the fortune teller. Many of the present statutes expressly define a fortune teller to be a vagrant or disorderly person. A few statutes expressly denounce fortune telling as larceny. These fortune telling statutes range from those which are all

18. Adolph Hitler was a ruthless practitioner of divination. He was the owner of one of the world's largest collection of books on fortune telling. Like the diviners of old, Hitler relied upon human sacrifices, astrologers, omens and his "intuition" in dealing with political and military problems. Even the Nazi swastika is an ancient good luck symbol in reverse.
19. See local statutes and ordinances.

inclusive and over a hundred words in length to those which consist of less than ten words. In some states the statutes specifically prohibit witchcraft and the practice of fortune telling by gypsies. Some states make the mere advertising by a fortune teller in a circular, handbill, newspaper or magazine a misdemeanor. Seeking to suppress such advertising at its source, Montana[20] goes so far as to make it an offense for a proprietor of a newspaper or magazine to publish such fortune telling advertisements or for a printer to print such advertising. As a simple but effective means of regulating as well as suppressing fortune telling, a number of states require a fortune teller to pay a high annual license fee in order to engage in such practice. West Virginia,[21] for example, charges a license fee of $500.00. Ohio has a very unusual statute which declares that "whoever not having been legally licensed to do so, represents himself to be . . . a fortune teller" is subject to criminal prosecution, but is silent about granting a license; this Ohio statute has been held constitutional and valid.[22] By express statutory grant, many municipalities have the power to license, tax, regulate or suppress fortune tellers.[23] Not only does the District of Columbia[24] require fortune tellers to pay a license tax of $250.00 per annum, but also requires a two years' previous residence and approval by the superintendent of police. A number of states expressly exempt the practice of fortune telling from its penal provisions where it is conducted as an amusement by charitable, civic, educational, fraternal or religious organizations and also in theatrical exhibitions.[25] Investigations and experiments in psychical research are exempted by the Montana statute.[26]

**b. Purpose.**—The main object of these fortune telling statutes is to prevent, suppress and punish all types of fortune telling practices whereby ignorant,

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20. Mont. Rev. Code Antd., 1935, No. 11524.
21. W. Va. Code Antd., 1937, No. 921.
22. Davis v. State, 26 Ohio A. 340, 159 N. E. 575 (1927).
23. City ordinance against fortune telling must be predicated upon a state statute granting such power. Chicago v. Ross, 257 Ill. 76, 100 N. E. 159 (1912). Fortune telling ordinance valid. Turner v. Kansas City, 354 Mo. 857, 191 S. W. (2d) 612 (1946).
24. District of Columbia Code 1940, No. 47:2342.
25. See local statutes.
26. Montana Rev. Code, 1935, No. 11522.

foolish, credulous and superstitious persons are defrauded.[27] These statutes also seek to protect the credulous weak, as well as the general public, from the designing knavery of needy, vicious experienced fortune tellers who resort to every trickery and device known to cunning to defraud their dupes. By ferreting out and enjoining fortune tellers from making a livelihood from such absurd, nefarious and fraudulent practices, these statutes endeavor to bar fortune tellers from victimizing the public.[28]

**c. Exemptions.**—In most states, fortune telling statutes expressly exempt those who engage in the practice of fortune telling as an ordained minister or as an exercise of a religious tenet or spiritual function. A few statutes specifically exempt Spiritualists from their penal provisions. Regardless of these statutory exemptions such practice is lawful only where it is conducted in good faith[29] as an incident to the participation of a religious exercise or worship which is exclusively religious.[30] This point is well illustrated by the case of State v. Delaney.[31] In this case, a meeting was conducted at a spiritualist church at which the defendant acted as the medium and "message bearer" and foretold to members of the congregation present of certain matters which would happen to them in the future. Each of the church members present contributed 25c, out of the collection of which, the defendant was paid for her services. It was held that the defendant was engaged in the performance of religious services, and that therefore she was not guilty of a violation of the statute. However, where the religious service is devoid of any religious presentation or exposition, the questions asked and the answers given do not differ from those usually submitted to and answered by an ordinary fortune teller, and the minister retains the entire collection for his own personal use, and none of the money or any portion thereof goes to the church, it has

27. People v. Ashley, 172 N. Y. S. 282 (1918); People v. Plaskett, 13 N. Y. S. (2d) 682 (1939).
28. People v. Adams, 32 N. Y. Cr. R. 326, 344 (1914).
29. City v. Westergren, 173 Ill. A. 562 (1912); People v. Plaskett, supra; People v. Miller, supra; Commonwealth v. Blair, 92 Pa. Super. Ct. 169 (1927).
30. Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940); City v. Payne, 160 Ill. A. 641 (1911); Stauffer v. State, 85 Tex. Cr. 1, 209 S. W. 748 (1919).
31. 1 N. J. L. Miscl. 619, 122 Atl. 890 (1923).

been held that such minister is an offender under the statute.[32]

**d. Application.**—A large variety of assorted fortune tellers, such as spiritualist ministers,[33] mediums,[34] clairvoyants,[35] seers,[36] astrologers,[37] horoscope casters,[38] palm readers,[39] occult scientist,[40] psychemetrist,[41] magnetic psychemetrist,[42] faith healers,[43] phrenologist,[44] psychologist,[45] character analyst,[46] mind readers,[47] card readers,[48] and soul reader[49] have been con-

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32. People v. Brossard, 33 N. Y. S. (2d) 369 (1942); People v. Strong, 53 N. Y. S. (2d) 941 (1944).
33. Spiritualism is now considered as a modern form of necromancy. Commonwealth v. O'Malley, 81 Pa. Super. Ct. 100 (1923). Irwin v. Barker, 69 Sol J. 589 (1925); Davis v. State, 118 Ohio A. 25, 160 N. E. 473 (1927); People v. Plaskett, 13 N. Y. S. (2d) 682 (1939); People v. Ashley, 172 N. Y. S. 282 (1918); People v. Strong, 53 N. Y. S. (2d) 941 (1944); In re Wedderburn, 151 Pac. (2d) (Cal.) 889 (1944); Gladstone v. Galton, 145 Fed. (2d) 742 (1944); People v. Brossard, 33 N. Y. S. (2d) 369 (1942).
34. Rex. v. Marcott, 2 Ont. L. R. 105, 4 Can. Cr. C. 437 (1901); Monck v. Hilton, 46 L. J. Mag. Cas. N. S. 163 (1877); McMasters v. State, 21 Okla. Cr. 318, 207 Pac. 566 (1922); People v. Gilman, 121 Mich. 187 (1899); Rex. v. Duncan, L. R. K. B. (1944) 713, 113 L. J. (K. B.) 411.
35. Rex v. Pollock, 47 Ont. L. R. 616, 33, Can. Cr. C. 155 (1920); People v. Elmer, 109 Mich. 493, 67 N. W. 550 (1896).
36. People v. Elmer, supra.
37. State v. Neitzel, 69 Wash. 567, 125 Pac. 939 (1912); Penny v. Hanson, 18 L. R. Q. B. (1887) 478. The defendant, a serious and sincere student of astrology, gave an astrological horoscope. She prefaced all her predictions with the phase, "It is indicated." She was held not to be a fortune teller. People v. Adams, 32 N. Y. Cr. R. 326 (1914).
38. State v. Hatfield, 87 N. J. L. 124, 93 Atl. 677 (1915).
39. People v. Malcolm, 154 N. Y. S. 919 (1915); Rex v. Monsell, 35 Ont. L. R. 336 (1916); Regina v. Milford, 20 Ont. L. R. 306 (1890); Regina v. Entwistle, 1 L. R. Q. B. (1899) 846; State v. Kenilworth, 69 N. J. L. 114, 54 Atl. 244, affd. 69 N. J. L. 674, 56 Atl. 113 (1903).
40. City v. Hellscher, 295 Mo. 293, 242 S. W. 652 (1922).
41. Rex v. Pollock, supra.
42. Stonehouse v. Masson, 2 L. R. K. B. (1921) 818.
43. The defendant told the patient that she was under the influence of an evil spirit, but that he could cure her. Thereupon, the defendant wrote the patient's name on a piece of paper, and then put it in his mouth, and chewed it. Soon after, he blew on his hand, and said that would cause the patient's disease to return to the person who had it first. He then gave the patient some medicine, talked to the spirits and prayed. Conviction affirmed. State v. Durham, 21 Del. (5 Pen.) 105, 58 Atl. 1024 (1904); Commonwealth v. Viscount, 118 Pa. Super. Ct. 595, (1935).
44. Rex v. Best, 3 West W. R. 635, 62 Can. Cr. C. 340 (1934).
45. Ibid.
46. Pellman v. Valentine, 57 N. Y. S. (2d) 617 (1945).
47. Dictum, Fay v. Lambourne, 108 N. Y. S. 874 (1908).
48. Stonehouse v. Masson, supra; Rex v. Best, supra.
49. People v. Elmer, supra.

victed under fortune telling statutes.

**(1) Use of hokus pokus.**—In those cases in which the courts have held various fortune tellers to be criminal offenders under fortune telling statutes, the fortune teller resorted to a pretense of supernatural powers,[50] or magical means.[51] Thus under a pretense of occult powers[52] or holding out as a medium with the power to communicate with departed spirits,[53] or answering confidential questions with purported spiritual aid,[54] the fortune teller resorts to fraudulent practices with the purpose of impressing his client through the use of "incantations or spells . . . magic formula or hokus pokus,"[55] such as a ghostly phosphorous hand,[56] spirit message writings,[57] crystal ball,[58] vibrations,[59] magnetism,[60] evil spirit,[61] second sight,[62] disguises,[63] incense charms,[64] musical instruments,[65] bird and animal spirits,[66] wears special garments and maintains an air of mysticism about the place,[67] and also relies upon fake seances,[68] and magi-

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50. Laing v. Macpherson, 55 Scot. L. Rep. 392 (1914).
51. Commonwealth v. Viscount, 118 Pa. Super. Ct. 595 (1935).
52. Monck v. Hilton, supra; Davis v. Curry, 1 L.R.K.B. (1918) 109.
53. Haas v. State, 26 Ohio Ct. 545 (1917); People v. Plaskett, supra.
54. McMasters v. State, supra; People v. Strong, supra.
55. Commonwealth v. Blair, 92 Pa. Super. Ct. 169, 171 (1927).
56. Monck v. Hilton, supra.
57. Queen v. Justices of M., 2 L. R. Q. B. (1877) 516.
58. Rex v. Stephenson, 68 J. P. 524 (1904); Hansen v. Archdall, 44 Australia Com. L. R. 265 (1930).
59. People v. Brossard, supra.
60. Davis v. Curry, supra.
61. State v. Durham, supra.
62. Stonehouse v. Masson, supra.
63. Commonwealth v. City Prison, 15 W. N. C. (Pa.) 282 (1884).
64. Commonwealth v. O'Malley, 81 Pa. Super. Ct. 100 (1923).
65. Regina v. Lawrence, 36 L. T. N. S. 404 (1877); Monck v. Hilton, supra.
66. Rex v. Duncan, supra.
67. People v. Adams, supra.
68. The defendant, a professional spiritualist medium, was engaged at a substantial fee to give a series off seances in a "temple" located in a flat above a store. In the dim light, the defendant produced her spirit guide, Albert, and stated that he had a message for one of the persons present, and that a form would appear of some who claimed to be a relative of that person. The form which materialized was that of a parrot. The evidence showed that the phenomena was produced by fraudulent devices. Conviction sustained. Rex v. Duncan, 1 L. R. K. B. (1944) 713. In Monck v. Hilton, 46 L. J. Mag. Cases N. S. 163 (1877), the defendant, a spiritualist, held a seance at which several persons were present, each of whom paid 5 shillings. The defendant told these persons, who were seated around a table, to place their hands on the table, and their feet under their chairs. The gas light was then turned down very low. Suddenly raps were heard under the

cal means to remove a purported curse,[69] spell[70] or evil influence.[71]

**(2) Predictions as to future events.**— Together with a pretense of supernatural powers and hokus pokus, fortune tellers make prophecies, predictions or forecasts, not based upon any ascertainable facts or reason, but on nebulous speculations,[72] as to such specific events[73] as marriage,[74] birth,[75] health,[76] death,[77] travel,[78] business ventures,[79] obtaining a position,[80] inheriting money,[81] war incidents,[82] and also for finding lost or stolen

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table. "They are here tonight"; the defendant said, "the conditions are very favorable." Next the defendant placed a tambourine on the table, and it moved towards him. Then the defendant put a small musical box on the table, and advised his listeners that one sound signified "No," and three sounds "Yes," and thereupon questions were asked and certain sounds were heard in return. Suddenly a ghostly phosphorous hand appeared above the table, and its fingers started to play on the tambourine, and then the hand quickly disappeared. When one of the persons present tried to search the defendant, the latter struck him, ran into a bedroom, and escaped by sliding down a sheet. In the boxes left behind by the defendant were found stuffed kid gloves with elastic on them, thin wire, a rod divisible into lengths, and linen with faces sketched on them. Later the defendant was apprehended, and his conviction was sustained.

69. The defendant told S. that there was a black dog which was running around S.'s house in a circle, and that this dog was a curse and could not be seen. S. was persuaded by the defendant to give him $36.00 to remove the spell. Conviction upheld. Commonwealth v. Dice, 38 York (Pa.) 41 (1924).
70. The defendant told S. that her illness was caused by a spell put on her by her sweetheart's mother. To break this spell, the defendant gave H. certain powders to burn, and told her to buy lemons, pins and ribbons, and how to use them. For this advice, H. paid the defendant $33.00. Later the defendant told H., who was ill, that someone had put a spell on her, and that someone in her family would die unless the spell was broken, which would only occur by digging up a heart in a certain cemetery. This was done by H. who paid the defendant $100.00. Conviction sustained. Commonwealth v. Viscount, 118 Pa. Super. Ct. 595 (1935).
71. State v. Durham, supra.
72. Stonehouse v. Masson, supra.
73. Queen v. Entwistle, supra.
74. People v. Ashley, supra; State v. Kenilworth, supra.
75. Ibid.
76. People v. Plaskett, supra.
77. Hanson v. Archdall, supra.
78. People v. Malcolm, supra.
79. Penny v. Hanson, supra.
80. People v. Ashley, supra.
81. State v. Neitzel, supra.
82. Death of a soldier. Davis v. Curry, supra. Soldier will not receive furlough. People v. Strong, supra. Soldier gassed, and husband will be drafted in the second call. Smith v. O'Sullivan, State R. So. Australia (1921) 349. Husband wounded in action, and brother a prisoner of war. Laing v. Macpherson, supra.

property.[83]

**(3) For commercial profit.**—Even where the fortune teller confines his practice as an incident to a religious exercise, he may be subject as an offender under the statute where it is shown that he is exploiting fortune telling for his own personal profit.[84] The courts are unanimous in holding that one is not authorized under a cover of religion or a religious exercise to tell fortunes for personal gain.[85] Religion cannot be used as a shield to cover a business undertaking. The commercial practice of fortune telling followed as a money-making venture or occupation under the false cloak of religion is the criminal practice of fortune telling within the plain meaning of the fortune telling statute, and is subject to its penal provisions.[86] The law is the same even though no fee is charged, but a gift, donation, subscription or gratuity is accepted.[87] This rule is particularly applicable to the practice of fortune telling where it is conducted for gain at a carnival, fair, circus,[88] cabaret or night club,[89] theatre,[90] and also where the fortune teller conducts his practice, apart from the church edifice, in an office building[91] or in a private residence, and who passes out cards,[92] circulars,[93] or places large self-eulogizing advertisements

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83. L.'s oats were stolen. He went to the defendant, a clairvoyant, and asked her to assist him to discover the whereabouts of the oats. The defendant took one of L.'s mitts in her hand, and slowly opened and closed her eyes, and told L. how the oats were taken, who took them, and where they could be found. She received 50 cents for her advice. L. found the oats as directed. The defendant was convicted as a fortune teller. Rex v. Pollock, 47 Ont. L. R. 616, 33 Can. Cr. C. 155 (1920).
84. Haas v. State, supra; People v. Ashley, supra.
85. People v. Ashley, supra.
86. Dill v. Hamilton, supra; State v. Neitzel, supra.
87. Laing v. Macpherson, supra; see also local statutes.
88. Dill v. Hamilton, supra.
89. Pellman v. Valentine, supra.
90. Fay v. Lambourne, supra.
91. People v. Strong, supra; People v. Brossard, supra. In Rex v. Duncan, supra, the "temple" was located in a flat above a store.
92. City v. Hellscher, supra; McMasters v. State, supra.
93. The defendant inserted in various newspapers the following advertisement: "Neptune, the astrologer, permanent address is 12, Grenville Street, London, W. C. . . . Terms sent on application. Wanted everyone to have their own nativity cast. Yearly advice given and astrological questions answered. For terms send stamp to Neptune at the above address." K., a detective visited the defendant and received a circular from him. The circular stated that "by the position of the planets in the nativity and their aspects to each other, we are able to

in the newspapers[94] or magazines or advertises over the radio. In a recent English case[95] it was held that a daily newspaper article on astrology which was addressed to the general public, and which purports to forecast future events only for persons born on a particular day is too vague and uncertain to amount to the professing to tell the fortune of any individual, and therefore is not unlawful.

(4) **Illustrated example.**—The typical use of hokus pokus and the prediction of future events by a fortune teller for commercial profit is well illustrated by the leading case of McMasters v. State.[96] In this case, the defendant, a spiritualistic medium, went into a trance,

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give the general description of the person, the disease liable to, health, mental abilities, disposition, the occupation most suitable, where and when successful, marriage, travelling, friends, etc., and the events of every day life. Interviews are unnecessary; all that is required is the time of birth as near as possible; day of week, day of month, year, sex and birth place." At the end was a scale of prices. In affirming the conviction, the court declared that "in this case, res ipsa loquitor." Penny v. Hanson, 18 L. R. Q. B. (1887) 478.

94. Penny v. Hanson, supra. In People v. Elmer, 109 Mich. 493, 67 N. W. 550 (1896), the defendant placed the following ad in an Ionia newspaper. "Will arrive at Ionia, Michigan, July 23, 1895. A modern day seer is now in the city, and can be consulted on all conceivable affairs of life and human destiny. This strange gift, which he only uses to the advantage of the human race, excites the wonder and admiration of the most skeptical, and will drive doubt from your mind, and slay skepticism on the threshhold of the interview. Being born with this marvelous power, and thoroughly conversant with the occult science, his revelations are truly wonderful, and acknowledged to be of the highest order. It has been said of him: 'Never in the annals of clairvoyancy have future events been so truthfully foretold.' He permits you a peep through the keyhole of the mysterious future, by which you may obtain the key of your future life and success. Advises you with a strange certainty of the proper course to pursue in life. If business affairs concern you, he gives advice on business transactions, lawsuits, wills, mortgages, speculations, pension claims, and other financial difficulties. If affairs of the heart or emotions of love interest you, he gives you some astonishing revelations of courtship, marriage, divorce and domestic troubles. Restores lost affection, peace and confidence to lovers and discordant families on a positive guaranty. Tells the name of your future husband or wife, and date of marriage. Locates lost, stolen, and buried property and treasures, on a positive guaranty. No money taken until the goods are in your possession. Also locates friends and relatives. No charge until you find them. Psychometry, or soul reading. Doctor gives deliniations of character, and tells what you are best adapted for." The defendant also represented himself as a clairvoyant, trance medium, and clairvoyant healer. Conviction sustained.

95. Barbanell v. Naylor, 3 All Eng. L. R. Antd. (1936) 66, 101 J. P. 13.

96. 21 Okla. Cr. 318, 207 Pac. 566 (1922).

and claimed to convey a message from the spirit of Minnehaha, an Indian maid. The defendant told her client, a "stool pigeon," that she would be offered a good job soon, that she would take a trip in the near future, that she would meet a blond-headed fellow and also a black-headed fellow, and that later she would marry a wealthy man. The client paid the defendant $1.00 for her services, and the latter gave her six calling cards to distribute to her friends. In affirming the conviction of the defendant, the Oklahoma court declared that the defendant's practice of fortune telling "is a system of speculative philosophy, attended with superstitious credulity and . . . tinged with hypocrisy. . . . It seems very much like a Gypsy fortune teller, or the reading of the palm by some wrinkled old hag, or the interpretations of a crystal gazer in a freak side show. Doubtless it was this species of hypocrisy and legerdemain that this statute was intended to suppress. An innocent practice or entertainment (like fortune telling), whether of a religious nature or not, may be regulated or suppressed where the tendencies and temptations to pervert it into evil channels is manifest, and where the evil is likely to overbalance the good. Fantastic philosophers and religious zealots, like other people, must conform to wholesome police regulations." In a jocular vein, the court concluded: "Appeals to the spirit world might avail before the case reaches us, but here we have no jurisdiction over any spirits except those banned by the prohibitory law, such as 'Bourbon,' Mountain Dew,' 'Forked Lightning,' and like distillates—like those in the spirit world, some good and some bad. . . . Again, is the (fortune telling) statute merely regulatory or is it prohibitory. Any ex-saloon keeper can explain the difference between regulation and prohibition. Can the state constitutionally prohibit communication with the spirit world, with which, so far as I am advised, we are at peace? If it cannot, can it, under the Fourteenth Amendment, deny the mediums of such communication a reasonable compensation for the services rendered? These inquiries appear to me to be pertinent in the instant case. However assuming that the statute in question is not in contravention of the commerce clause of the Federal Constitution, and that the state has the power to regulate, I concur, because the medium in question never filed her schedule of rates with the State Corporation Commission."

2. **Medical Practice Acts**

a. **In General.**—See Ch. II, Faith Healing, Legal Aspects, B, 1.

b. **Application.**—A regular ordained Spiritualist minister whose treatment of human ailments consists solely of prayer or spiritual means is generally exempt from the penal provisions of the several medical practice acts.[97] The law is otherwise as to clairvoyants and other fortune tellers,[98] particularly where their treatment is accompanied by any "hokus pokus" or any physical means or agencies.[99]

3. **Obtaining Money Under False Pretenses.**—"A person who falsely claims to supernatural powers, and thereby obtains money or goods . . . (by means of fortune telling), is indictable for false pretenses, when the party defrauded is really imposed upon."[100] Thus "astrologers, conjurers, magicians, mediums,[101] and all

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97. A certified healer of a spiritualist church went into a trance, and prayed for divine healing. Held exempt. People v. Klinger, 292 Ill. A. 321, 11 N. E. (2d) 40 (1937). Commonwealth v. Blair, 92 Pa. Super. Ct. 169 (1927).

98. Spiritualist prayed and manipulated his client's shoulder and back. Convicted. People v. Krause, 291 Ill. 64, 125 N. E. 726 (1920). Defendant relied on spirits to diagnose his client's ailment, said prayers, and gave him a bottle of medicine with directions as to its use. Convicted. People v. Moser, 176 Ill. A. 625 (1913). Clairvoyant doctor went into a trance, and then claimed to be under the control and guidance of an Indian spirit who would tell him whether he could cure the patient, and also what to do to effect a cure. The clairvoyant's treatment consisted of rubbing on some salve, and prescribing a powder to take internally. Convicted. People v. Kenyon, 201 Mich. 647 (1918). Clairvoyant healer gave his patient a bottle of medicine and charged a fee. The defense of the clairvoyant was that his diagnosis and the medicine prescribed was revealed to him by clairvoyance. Convicted. Commonwealth v. Lindsey, 223 Mass. 392, 111 N. E. 869 (1916). Healer had a "gift" for curing ailments, which she did by making passes with her hands. Rex v. Couture, 15 Can. Cr. C. 147 (1909). "Conjuring treatment." Cooper v. Livingston, 19 Fla. 684 (1883). Medical clairvoyant. Bibber v. Simpson, 59 Maine 181 (1871).

99. Ibid.

100. Wharton's Criminal Law, 12th Ed., Vol. 2, # 1405, p. 1703-4.

101. Clairvoyancy and palmistry used. Rex v. Zillah, So. Africa L. R. (1911) C. P. D. 643; Rex v. Nothout, So. Africa L. R. (1912) C. P. D. 1037. Medium exposed in a materializing seance. People v. Gilman, 121 Mich. 187, 80 N. W. 4 (1899). Likewise, Gordon v. Keeper of County Prison, 15 W. N. C. (Pa.) 282 (1884), where in the midst of a seance, a reporter tripped the medium, and tore off his outer garment. Around the body of the medium were found silken robes, night gowns, chemises, shawls, laces, mosquito nettings, wigs, moustaches, etc., used by him for various impersonations. Medium represented that he had the power to communicate with the spirits of deceased persons, and to summon them through the

variety of pretenders to supernatural powers[102] who assume to sell the same for money, are amenable to the criminal law of false pretenses."[103] This rule has also been held applicable to magic healers[104] and also to a

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use of tambourines, banjos and bells, and cause these spirits to produce musical sounds. Conviction affirmed. Reg. v. Lawrence, 36 Law Times R. N. S. 404, 41 J. P. 549 (1877). Mrs. M., a 42 year old widow, saw the defendant's advertisement in a newspaper in which he designated himself as a clairvoyant who was noted for his "marvellous foresight and accurate advice upon all problems of life," and saves you from the saddest words, "It might have been." She visited the defendant at his office. In response to her questions, the defendant told Mrs. M. that Chicago would be the best place for her to practice chiropractics for which she had just finished training. The defendant charged her $20.00 to remove an "evil influence" which he claimed was following her. When the defendant learned that Mrs. M. was worth over a $100,000.00, he became very friendly with her. He told her that God had given him a marvellous gift, and that if he ever did wrong, it would be taken away from him. He persuaded her to give him $27,500.00 for investment, and there was an understanding that they were soon to be married. He suddenly disappeared, taking her money with him. He was apprehended. At the trial, the evidence showed that the defendant was married, and that his practice was a racket. Conviction affirmed. State v. Bertsche et al, 265 Ill. 272, 106 N. W. 823 (1914).

102. Ibid. A gypsy, who represented that she had supernatural powers, told X that she had been cheated out of some property, and persuaded X with the story that in order to recover it, X would have to put all her gold and valuables in a shawl and bury it for a few days, and when dug up, the other property would be found in the shawl. The gypsy stole the shawl with its valuables, but was later apprehended and convicted. Regina v. Bunce, 1 Fost. & F. 523 (1859). In Regina v. Giles, 10 Cox C. C. 44, 34 L. J. Mag. Cas. N. S. 50 (1865), a wife was crying in the street because her husband had left her. A stranger told her to see the prisoner for aid. The prisoner told her that she had a certain "stuff" which had the power to bring back her husband over hedges and ditches within several days. For her services, the prisoner received a dress and a six pence. The prisoner was convicted.

103. U. S. v. Calwer, 292 Fed. 1007, 8 (1923).

104. The "professor" had W., his patient, write his name and age on a piece of paper. The "professor" folded it and placed it on his forehead, and then told W. that he had stomach trouble which he could cure in six weeks. The "professor" gave W. a charm to wear around his neck for one hour. W. paid $26.00 for this treatment. The "professor" was convicted. Jules v. State, 85 Md. 305, 36 Atl. 1027 (1897). In Bowen v. State, 9 Bax. (Tenn.) 45, 40 Am. Rep. 71 (1876), the "doctor" told a negro that there was poison in his house, and that it was the cause of the illness of his granddaughter, and to effect a cure that it would be necessary to remove the poison. The "doctor" told the negro that two little hair balls found in the house had caused the poison. The "doctor" also told the negro that if he wanted to protect himself against his enemies that he would need "Jack", a bottle filled with white fluid with a rag tied to it, which would give him advice on all questions. The negro paid the "doctor" $74.00. The "doctor" was convicted.

"witch" doctor.[105]

**4. Use of Mails to Defraud.**—Under the Federal statute[106] making it an offense to use the postoffice for fraudulent purposes, it generally is a criminal offense to send out letters or circulars through the mails in a common scheme to defraud, and generally to entrap the unwary, particularly where the mailer represents himself as the possessor of supernatural powers or is a vendor of magical tokens. These types of fortune telling cases, in which the mails are used, can be divided into the following three categories: the first, which involves a physical impossibility; the second, which deals with good luck tokens; and the third, and most important, a scheme which is planted upon a tenet.

**a. Physical Impossibility.**—In U. S. v. Fay,[107] the defendant mailed out circulars in which he claimed that he possessed a mysterious and superhuman power to penetrate with mental vision into the bowels of the earth, and discover the location of hidden treasures. H. paid the defendant $50.00 to find some buried treasure on his farm, but the defendant was unsuccessful. The federal court acquitted the defendant on the charge of using the mails to defraud upon the grounds that a person, who was possessed of ordinary prudence and sagacity, could not be deceived by such irrational, stupid and nonsensical pretense which involved a physical impossibility. "A manifest hoax or humbug . . . or any other scheme which belies the known and generally recognized laws of nature, cannot, in the nature of things, deceive any rational person. . . . The law in question deals with and contemplates rational beings . . . possessed of ordinary prudence and sagacity . . . (This is a case which involves) . . . a physical impossibility," and does not relate to any religious tenet.

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105. In Rex v. Masiminie, (Africa) Transvaal L. R. (1904) S. C. 560, T. was suffering from an ailment. He went to see a native witch doctor to determine its cause. The witch doctor had one F. roll some bones as a means to ascertain the cause. The witch doctor then told T. that his illness was caused by F. The witch doctor charged T. 5 shillings. The witch doctor was convicted, but on appeal the conviction was reversed mainly because the court felt embarrassed by the silly facts of the case, and apparently felt that this criminal prosecution was an invasion of the superstitious practices of the natives in the region.

106. 18 U. S. C. No. 338 (1940 Ed). See also Wharton's Criminal Law, 12th Ed., Vol. 3, # 2200, footnotes.

107. 83 Fed. 839 (1897).

**b. Good Luck Tokens.**—In Dolan v. Hurley,[108] a federal judge held that the sale of lucky stones, without falsehood or misrepresentations, through the mails is not fraudulent, because there "is nothing immoral in a belief that gems or amulets affect the wearer's fortune. It is an old and respectable superstition. Indeed, it is by no means sure that the confidence inspired by a belief in such objects may not be of real value. Some room must be left for the play of individual fancy. If people who believe in lucky stones or four leaf clovers wish to buy them, I see no sufficient reason why they should be prevented from doing so."

**c. Scheme Predicated on a Tenet.**—"A scheme to defraud, planting itself upon, and seeking to take advantage of . . . (religious) tenets, entertained as they are by a large number of people" . . . is unlawful.[109] This ruling is well illustrated by the following two cases: In U. S. v. Calwer,[110] the defendant mailed out circulars in which he represented that evil spells or curses can be cast on persons, and that evil spirits worry them in their sleep, that certain charms or talismans will defeat these evils, and that he possessed supernatural powers to magnetize these talismans which he offered for sale at $25.00 each. In affirming the defendant's conviction, the federal court stated that "the statute does not stipulate the scheme or artifice or false pretenses must be calculated to deceive persons of average intelligence. Its ostensible object is to avoid abuse of the mails, and schemes or artifices or false pretenses to defraud ignorant, credulous, superstitious, or defective can be used in this abuse, and probably with more success, if that be material, than those which appeal to higher intelligence." In U. S. v. Ried,[111] the defendant sent out circulars through the mails. The first circular, which he mailed out to prospects, was as follows:

> "Dr. Ried, the Spirit Postmaster.
>
> How to get a sealed letter from your spirit friends. If you are troubled by finances, sickness, family matters or undecided in special matters, do the following:
>
> 1. Write the full name of your spirit friends on a

108. 283 Fed. 695 (1922).
109. U. S. v. Fay, 83 Fed. 839, 840 (1897).
110. 292 Fed. 1007 (1923).
111. 42 Fed. 134 (1890).

slip of paper.

2. Address them by terms of relationship.
3. Ask your question.
4. Sign your name in full.

Then put your question in an envelope and seal it. Then write on another sheet of paper to whom the replies should be sent, place your sealed envelope and note of instruction in another envelope, and address it to him. Dr. Ried has answered several thousand letters and has been uniformly successful. Money refunded if no answer can be given. Fee for answering sealed letter, $1.00. If sewed or sealed with wax, $5.00."

The evidence showed that the defendant had received a large number of such letters with fees enclosed, and had made use of a trick in opening such sealed letters. The conviction of the defendant was affirmed. It was held that he was gulling the public.[112]

5. **Defenses.**—Whenever a fortune teller is subjected to criminal prosecution, one or more of the following defenses have been raised: honest belief, truth of the prophecy, no specific intent to deceive, no device used, amusement, instruction in art, predictions based upon textbook rules, value received, character analyst, liberty of speech and constitutional religious freedom.

a. **Honest Belief.**—"The deception is that which results objectively from the assertion of the claim (of the power to tell fortunes), and it is immaterial whether the person claiming to exercise the power honestly believes that she possesses the power, or is a mere charlatan or cheat, if the assertion of the claim is made with the intention that the person to whom it is made shall believe in the existence of the power."[113] (This mischief) "of attempts to pierce the veil of the future by predictions not based upon ascertainable facts, or according to reason . . . is as great in the case of the honest diviner as in the case of the fraudulent charlatan. . . . The offense of undertaking to tell fortunes is complete when a person, whether honestly believing in his power to do so or intending to deceive, undertakes to tell another person's fortune."[114]

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112. See also Ch. II, B, 5.
113. Rex v. Pollock, 47 Ont. L. R. 616, 623, 33 Can. C. C. 155 (1920).
114. Copeland v. Cummings (1921) New Zealand L. R. 326, 330.

**b. Truth of the Prophecy.**—"Should the . . . contention of the (fortune teller that an element of deceit or fraud must be proved in order to justify her conviction under the statute) be upheld, it would be obvious that no person could be convicted under this (fortune telling) statute until the lapse of time had proved that the prophecy was false, which would nullify the efficacy of the statute. . . . The Legislature employed the language of the statute to signify its disbelief in human power to prophecy human events. . . . The statute contains no exception. . . . The basis on which such prophecies are made or the methods by which such prophecies are arrived at (are immaterial)."[115]

**c. No Specific Intent to Deceive.**—"A person undertaking to tell fortunes impliedly asserts his power to tell fortunes, and in doing so is asserting the possession of a power which he does not possess, and is thereby practicing deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offense aimed by the enactment is complete . . . (and) it is not necessary that he should succeed in deceiving or defrauding."[116] As was clearly stated by an English judge: "I cannot imagine anybody holding himself out to tell fortunes for money who does not perfectly well know that he is deceiving and that he intends to deceive. . . . Whenever an Act (like the one against fortune telling) is passed for the protection of the community against some evil influence, physical or intellectual, mens rea is not always necessary. . . . When a person professes to be a fortune teller for reward, it appears that he is professing to tell fortunes truly. That is the state of things which the (fortune telling) statute aims at, and says that it is a public mischief. . . . (The mere pretending to tell fortunes is of itself an offense)."[117]

**d. No Physical Device Used.**—A number of fortune telling statutes expressly apply to the use of physical devices in the practice of fortune telling. How-

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The case of Stonehouse v. Masson, 2 L. R. K. B. (1921) 818, overruled Davis v. Curry, 1 L. R. K. B. (1918) 109, which held that an honest belief without intent to deceive was a good defense in fortune telling prosecutions.

115. People v. Malcolm, 154 N. Y. S. 919, 920-1 (1915).
116. Rex v. Monsell, 35 Ont. L. R. 336, 338-9, 26 Can. Cr. C. 3 (1916).
117. Stonehouse v. Masson, 2 L. R. K. B. (1921) 818, 824-5.

ever, it "matters (not) in the least whether any device is used . . . in telling fortunes. . . . The offense consists in telling fortunes with the intent to deceive, . . . and that an act is no less an offense under the statute because there is no device employed but simply a statement made by word of mouth by the person accused to those who consult her."[118]

**e. Amusement.**—Generally, when fortune telling is performed as a joke or as a drawing room amusement without any intent to deceive or defraud, it is not an offense under the fortune telling statute, particularly if no fee is charged or donation accepted.[119] In elaborating on this rule, an English judge[120] declared that no offense would be committed by a person, if she were to say in advance: "I am not a real fortune teller; I cannot tell fortunes; what I am about to tell you must not deceive you in any way, but I will pretend or profess to tell your fortunes by the use of the ordinary means which people use to tell fortunes." This judicial statement was incorporated by a fortune teller into her practice in an attempt to evade the statute in an Australian case[121] which was decided three years later. In this case, the defendant read the following words out of a book to a policewoman: "I do not wish you to be deceived or imposed upon in any way by anything I may do or say. Understand, I do not pretend to know, or tell, or read or discover your fortune or that I am able to do so. I do not claim any supernatural or occult powers, nor do I use any subtle craft, means or device. I merely wish to amuse you, and you must not take anything I may say to you seriously, for I do not pretend that it is or will come true, nor do I intend that you should believe any of it, or take it seriously." Then the defendant asked the policewoman to sign the book, which she did. The defendant told the policewoman that her brother had suffered an injury, that he would return home soon, get married, and become prosperous. The defendant charged the policewoman 2 shillings, plus amusement tax. At the trial, the evidence showed that the defendant had been conducting such practice for twelve years, six days a week, on the average of ten customers a day, had been

118. Laing v. Macpherson, 55 Scot. L. Rep. 392, 396 (1918).
119. Davis v. Curry, 1 L. R. K. B. (1918) 109, 116.
120. Ibid.
121. Smith v. O'Sullivan, State R. So. Australia (1921), 349.

once convicted as a fortune teller, and had made use of this opening statement on the advice of her solicitor. In affirming the defendant's conviction, the Australian court declared that she is "a professional fortune teller. She pretended to tell . . . (the policewoman's) fortune. She thought to escape from the penalties of the law by telling . . . (her) beforehand that she had no belief in her own powers, and asking her not to be deceived, but to consider herself as being merely entertained or amused. Such stipulations are futile. To pretend to foretell the future is prohibited because of the harm it may do in the community. It is deceitful and therefore mischievous. To call it an amusement or an entertainment when it is practiced as a means of gaining a livelihood, does not alter its real character. It is the identical evil under a different name."

**f. Instruction in Art.**—The defendant's door had a sign on it which bore her name and the words, "Psychologist, Crystal, Cards, Artist, Author, Public Speaker." The defendant told the inspector that she did not charge for palm reading, but only for instructions pertaining to art, and made him sign such a statement, and made a charge of $1.00. Then the defendant gave the inspector instructions as to her art, and commenced to read his hand, and told him of certain indications therefrom that he was going to accumulate a lot of money. The defendant also measured his head, and told him to believe in the hereafter, and then she read his cards. Conviction sustained.[122]

**g. Based upon Rules in Textbooks.**—In Rex v. Monsell,[123] the defendant was indicted for telling fortunes contrary to the statute. The defense was that the prosecuting witnesses were not deceived because they signed a document which stated that they understood that what was being done was merely an examination of their palms according to the rules laid down in certain books on palmistry. In affirming the conviction, the Ontario court asserted that such writing was a mere sham, and made with the intent to evade the law.

**h. Value Received.**—In Rex v. Nothout,[124] the fortune teller made the visitors sign a statement that they had received value for their money. Conviction upheld.

122. Rex v. Best, 3 West W. R. 625, 62 Can. Cr. C. 340 (1934).
123. 35 Ont. L. R. 336, 26 Can. Cr. C. 1 (1916). Overruled. King v. Chilcott, 6 Can. Cr. C. 27 (1902).
124. So. Africa L. R. C. P. D. (1912) 1037.

**i. Character Analyst.**—In Pellman v. Valentine,[125] an application was filed under the New York Civil Practice Act for an order to require the police commissioner to issue to the petitioners identification cards as cabaret employees. Police regulations prohibit the employment in a cabaret of a person who does not hold such an identification card. The petitioners are engaged in character analysis or character reading either by palmistry or graphology. The police commissioner had required the petitioners to surrender their identification cards, and had refused to issue them new ones upon the grounds that they were fortune tellers who were engaged in the unlawful practice of fortune telling. In its decision, the New York court averred: "So much of the regulation as prohibits the telling of fortunes in cabarets, 'whether by palmistry, astrology, phrenology or any other name or method,' including clairvoyance, must be upheld. Such an occupation is unlawful, and any person who practices it is a disorderly person and punishable as such. But a person who merely practices character analysis is not a disorderly person. Accordingly, while that occupation may be regulated, it may not be prohibited. . . . But this does not mean that a person may, with impunity, tell fortunes under the guise of character analysis or character reading. The telling of fortunes, regardless of the means or methods employed, is forbidden. . . . Nor does this mean that a person who describes herself as a character reader or a character analyst is entitled to an identification card as a matter of course. Such a person may be, as the police commissioner contends these petitioners are, nothing more than fortune tellers masquerading under a new name or label. Here a triable issue of fact, is presented, as to which the parties are entitled to a trial."

**j. Liberty of Speech.**—"It is claimed by counsel (for the defendant fortune teller) that a statute penalizing the craft of fortune telling is in violation of the constitutional provision relating to the liberty of speech. To this it may be answered that the liberty of speech is not license to speak anything that one pleases freed from all criminal or civil responsibility. The constitutional guaranty of freedom of speech does not deprive the state of its police power to enact laws for the protec-

125. 57 N. Y. S. (2d) 617 (1945).

tion of the public safety and morals and the protection of the general welfare."[126]

**k. Constitutional Religious Freedom.**—Whenever a fortune teller is subjected to criminal prosecution, the defense of constitutional religious freedom is always raised. On this point, however, the law is well settled that although the government may not interfere with mere religious beliefs and opinions, it can prohibit and punish religious practices which are criminal offenses.[127] Since either a violation of the fortune telling statute,[128] medical practice act,[129] the federal statute against the use of the mails to defraud,[130] or obtaining money under false pretenses[131] is a criminal offense, it can readily be seen that a fortune teller, whose prac-

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126. Davis v. State, 118 Ohio St. 25, 31, 160 N. E. 473 (1928).
127. The first Amendment to the Constitution of the United States declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This Amendment, which guarantees religious liberty, has been interpreted to mean "to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. . . . It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. Should a sect (with tenets encouraging crime) ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious belief, their supporters could be protected in the exercise by the Constitution of the United States." Davis v. Beason, 133 U. S. 333, 342-3, (1889). To permit a man to excuse his criminal practices because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." Reynolds v. U. S., 98 U. S. 145, 167 (1878). Therefore no plea of religion can shield a person who commits a criminal offense, because the nation would be at the mercy of superstition, if criminal offenses could be "committed with impunity, because sanctioned by some religious delusions." State v. Marble, 72 Ohio St. 21, 32, 73 N. E. 1062 (1905).
128. Ch. I, B, 1.
129. Ch. I, B, 2.
130. Ch. I, B, 4.
131. Ch. I, B. 3.

tices make him guilty of any of these offenses, cannot claim the defense of constitutional religious freedom.[132]

**l. Psychical Research and Investigation.**—Where fortune telling is conducted as an experiment and for psychical investigation and research in pursuance to scientific pursuit, it may in such cases be a defense, provided it is conducted in good faith and not for commercial profit.[133]

**6. Belief in Fortune Telling as an Insane Delusion (Defense in Murder Cases).**—The general rule is that a belief in any phase of fortune telling is not an insane delusion, and therefore in such cases, it is not a defense in murder cases; however, a person may think persistently and continually in such belief, and lose his power to reason properly, and should his mind assume the chronic condition of the delusion, which when it controls and dictates the conduct, and subverts and sets aside the individual judgment, will and conscience, then the victim of such condition is a monomaniac, and in these type of cases such a belief may be a defense in murder cases.[134] In the following two cases, it was held that the belief in fortune telling as held by murderers was not an insane delusion on their part, and therefore could not be raised as a defense in a prosecution for murder. In Groce v. Territory,[135] the defendant murdered his wife. He was tried for murder. As a defense, the defendant offered testimony that he consulted a palmist, and acted upon her instructions relative to attempting to effect a reconciliation with his wife. In affirming the defendant's conviction for murder, the Arizona court held that such evidence did not prove the insanity of the defendant. In Hotema v. U. S.,[136] the defendant, an Indian, believed in witches and what the Bible said about them, and also that the deaths occurring in the neighborhood were due to the evil influence of witches. While drunk, the defendant killed a woman whom he believed to be a witch, although at the time he knew it was a violation of the law for which he would be punished. In

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132. Ibid; footnote numbers 128-131; and also 33.
133. Dictum. Monck v. Hilton, 46 L. J. Mag. Cases 163, 168 (1877). See also provisions of local fortune telling statutes.
134. Hotema v. U. S., 186 U. S. 413 (1902).
135. 12 Ariz. 1, 94 Pac. 1108 (1908).
136. 186 U. S. 413 (1902).

affirming the defendant's conviction, the court held that the defendant's belief in witches was not an insane delusion, and hence his plea of insanity was no defense, and that he was criminally liable for his offense.

### C. Civil Aspects

#### 1. Belief in Fortune Telling

**a. Testamentary Capacity.**—"The fact that a person believes in witchcraft,[137] clairvoyance,[138] spiritual influences,[139] presentiments of the occurrences of future events,[140] dreams,[141] mindreading and the like,[142] does not necessarily affect the validity of his will. Manifestly, a man's belief cannot be made a test of sanity. When we leave the domain of the experience or knowledge and enter upon the field of belief the range

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137. Schild v. Rompf, 9 Ky. L. 120, 4 S. W. 235 (1887); Fulbright v. Perry Co., 145 Mo. 432, 46 S. W. 955 (1898); Van Guysling v. Van Kuren, 35 N. Y. 70 (1866); Kelly v. Miller, 39 Miss. 17 (1860); Jones v. Hughes, 15 Abbott N. C. (N.Y.) 141 (1883); Leech v. Leech, 1 Phil. 244 (1851). Testator believed that all women were witches. Lee v. Executors, 4 McCord (S. C.) 183 (1827). Testator believed that his wife and daughters, with whom he did not get along, were witches and that they practiced their infernal arts upon him. Addington v. Wilson, 5 Ind. 137, 61 Am. Dec. 81 (1854).
138. Chaffin's Will Case, 32 Wis. 557 (1873).
139. Whipple v. Eddy, 161 Ill. 114, 43 N. E. 789 (1896); Buchanan v. Pierie, 205 Pa. 123, 54 Atl. 583 (1903); Will of Smith, 52 Wis. 543, 8 N. W. 616 (1888); Thompson v. Thompson, 21 Barb. (N. Y.) 107 (1855); Spencer's Estate, 96 Cal. 448 (1892); Crumbaugh v. Owen, 238 Ill. 497, 87 N. E. 312 (1909); Otto v. Doty, 61 Ia. 23, 15 N. W. 578 (1883); Re Dunaghugh's Will, 130 Ia. 692, 107 N. W. 925 (1906); Raison v. Raison, 148 Ky. 116, 146 S. W. 400 (1912); McCrocklin's Administrator v. Lee, 247 Ky. 31, 56 S. W. (2d) 564 (1933); Brown v. Ward, 53 Md. 376 (1879); McClary v. Stull, 44 Neb. 175, 62 N. W. 501 (1895); Middleditch v. Williams, 45 N. J. Eq. 726, 27 Atl. 826 (1889); Re Randall, 99 Me. 396, 59 Atl. 552 (1904); Billings' Appeal, 49 Conn. 456 (1882). A business man who relied on information obtained from the spirit of a little squaw. Storey's Will, 20 Ill. A. 183 (1886), 120 Ill. 244, 11 N. E. 209 (1887). Spiritualistic seances. Re Rohe's Will, 50 N. Y. S. 392 (1898). Materialization of spirits. Re Seibs Estate, 70 Wash. 374, 126 Pac. 912 (1912). Conversations with spirit of deceased husband. Re Hanson's Estate, 87 Wash. 113, 151 Pac. 264 (1915). Conversation with spirits through mediums. Barr v. Sumner, 183 Ind. 402, 107 N. E. 675 (1915). Evil spirits. Robinson v. Adams, 62 Me. 369 (1874).
140. Ibid.
141. Chaffin's Will, 32 Wis. 557 (1873); Turner v. Hand, 24 Fed. Cas., No. 14257 (1855).
142. Divining rods and philosopher's stone. Thompson v. Thompson, 21 Barb. (N. Y.) 107 (1855). Belief in the doctrine of metempsychosis—the souls of men after death pass into animals. Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128 (1872).

is limitless, extending from the highest degree of rationality to the wildest dreams of superstition. What to one man is a reasonable belief is to another wholly unreasonable. While, under certain circumstances, belief in what men generally understand to be supernatural may tend to prove insanity, it is well known that some of the brightest and clearest intellects have honestly believed in spiritualism and other supernatural influences. . . . It is the settled law that testamentary capacity cannot be determined, alone, by what one believes, nor by the character of the tales he tells concerning hidden treasures,[143] spirits,[144] spooks and supernatural things."[145]

Although the general rule is that a belief in any phase of fortune telling, particularly spiritualism, is not an insane delusion, and therefore does not destroy testamentary capacity, yet such belief may where it is permitted constantly to occupy the mind, the mind assumes the chronic condition of the delusion, which controls and dictates the conduct, and should it subvert and set aside the individual judgment, will and conscience, then when a victim of such condition, the testator is a monomaniac. Such monomania will cause the testator to make a different disposition in his will than he would have normally made.[146]

In the following cases, the testator believed in fortune telling to such an extent as to destroy his testamentary capacity: Thus in Compton v. Smith,[147] the testator believed that he could communicate with the dead by written letters and over the telephone. In a Kentucky case,[148] the testatrix had hallucinations that her deceased husband often visited her, and that she saw him and conversed with him. In McReynolds v. Smith,[149] the testator claimed through Swedenborg's teachings he had visited the planets, had acquaintances in Mars, Jupiter and Saturn, and that Saturn would be his future home and that he intended to operate a quarry there. In a Michigan

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143. Carnhan v. Hamilton, 265 Ill. 508, 107 N. E. 210 (1914).
144. See footnote number 139.
145. Carnhan v. Hamilton, 265 Ill. 508, 522, 107 N. E. 210 (1914). Page on Wills, 3rd Ed., Vol. 1, No. 149.
146. See cases cited in footnote numbers 147-150.
147. 286 Ky. 179, 150 S. W. (2d) 657 (1941).
148. Davis' Executor v. Laughlin, 280 Ky. 422, 133 S. W. (2d) 544 (1939).
149. 172 Ind. 336, 86 N. E. 1009 (1909).

case,[150] the testator believed that a spirit gave him a five dollar bill, and then tried to kill him with a knife.

**2. Undue Influence by a Medium.**—The law presumes that undue influence has been used where a person makes a will or conveys a gift to a medium or similar spiritualistic adviser, particularly in those cases where the value of the legacy or gift is very large,[151] where the testator or grantor is very old and in feeble health,[152] where the gift or legacy is made to the exclusion of the natural objects of the bounty of the testator[153] or where the medium practiced fraud and deceit.[154] In the leading English case[155] on this point, the plaintiff, a widow, age 75, had been deeply in love with her husband. She was recommended by her hairdresser to the defendant, a spiritual medium, who in a seance gave her a purported spirit rapping message from her deceased husband which told her that she should adopt the defendant as her son. Believing that she was fulfilling the wishes of her deceased husband, the plaintiff gave to the defendant gifts in the form of securities valued at 60,000 pounds in pursuance to her plans to adopt him. Before the actual adoption however, the plaintiff realized her foolishness, and brought suit in equity to recover these gifts. In finding a decree for the plaintiff, the court held that the relation which was proved to have existed between the plaintiff and the defendant established an implied exercise of dominion and influence of the defendant over the mind of the plaintiff. The court also denounced the practice of the defendant as "mischievous nonsense, well calculated on the one hand, to delude the vain, the weak, the foolish and the superstitious; and, on the other, to assist the projects of the needy and the adventurer." Likewise in accord is the leading American case of Orchardson v. Cofield.[156] In this case, the testatrix was 83 years old, afflicted with cancer, and a widow for seventeen years. She was very much interested in spiritualism,

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150. O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736 (1907).
151. Lyon v. Home, L. R. 6 Eq. 655 (1868).
152. Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197 (1898).
153. O'Dell v. Goff, supra; Greenwood v. Cline, 7 Ore. 17 (1879); Thompson v. Hawks, 14 Fed. 902 (1883).
154. Ibid. Page on Wills, 3rd Ed., Vol. 2, No. 841.
155. Lyon v. Home, L. R. 6 Eq. 655 (1868).
156. 171 Ill. 14, 49 N. E. 197 (1898).

and became acquainted with one O., a 57 year old man who had no means and was living with a lewd woman. O. spent much of his time with the testatrix, and pretended that he was writing a book with the assistance of spirit hands of famous persons, long since dead. The contents of this book referred to O. as one destined to be the saviour of the human race and comparable to Christ. One of the articles which O. wrote was published at the expense of the testatrix, and it contained many flattering references to her. Through a friendly medium, O. got the testatrix to believe that the spirit of her dead husband wanted her to marry O., which she did. Later, the testatrix became fanatical about spiritualism, and permitted her business matters to be dictated by advice from the spirits. She died shortly after, and by her will left most of her property to O. A bill was filed to contest the will, and also to have the marriage declared null and void. In holding both the will and marriage void, the Illinois Supreme Court declared that when, "as here shown, an act was done under the promptings of an insane delusion, and the proof shows that it was the result of belief in facts the existence of which no rational person would believe, insanity is proved. Belief in spiritualism is not proof of insanity, but if through that belief, one is led into the delusion that another is a god,—a Christ,—or gifted with powers and faculties belonging only to supernatural persons, the believer of the delusion is insane on that subject, and if he is prompted to make a will by that delusion his will cannot be sustained."

**3. Property Rights in Fortune Telling.**—A serious published work on any phase of fortune telling which affirms its truth and validity will not be protected by the courts insofar as its copyright or other property rights are concerned.[157] This rule not only applies to published works, but also to inventions, trademarks, business names[158] and vaudeville acts[159] which are predicated upon fortune telling. The reason for this rule is based upon the inherent fraudulent aspects of fortune telling which vitiates anything with which it is concerned. In the carefully considered case of Fay v. Lambourne,[160] the

157. Fay v. Lambourne, 108 N. Y. S. 874 (1908); Gladstone v. Galton, 145 Fed. (2d) 742 (1944).
158. Fay v. Lambourne, supra.
159. Ibid.
160. 108 N. Y. S. 874 (1908).

plaintiffs, husband and wife, were acting in vaudeville under the name of "The Fays." Their act consisted of mind reading and telling the past as well as future events which the wife claims she is able to perform as a result of supernatural powers. People in the audience would write questions which the wife would answer from the stage. The defendants, former employees of the plaintiffs, gave similar performances under notices, which were similar to the name of the plaintiffs, in which they exposed the falseness of the alleged occult perfomances of the plaintiffs. The plaintiffs brought suit to enjoin the defendants in the performance of their act. In denying relief, the New York court declared that the "plaintiffs are engaged in deceiving the public, and the most entertaining part of their performance, is, in effect, fortune telling. In such a business, they can get no property rights in a name or appellation which a court of equity will protect. A party invoking the aid of equity to restrain the infringement of a trademark must himself be free from fraud in his representations to the public. The pretense of occult powers and the ability to answer confidential questions from spiritual aid is as bad as fortune telling, and is a species of it, and is a fraud upon the public. It is no answer, so far as the plaintiffs are concerned, that no one ought to believe the pretenses. It is the half doubt and the half belief of a certain class of people that make and hold audiences. If everyone wholly disbelieved, curiosity would soon be satisfied, and the entertainment lose its attraction." On the basis of this decision, it would appear that a fortune teller has no right of action for libel, slander or false imprisonment which arises from his fortune telling activities.[161]

**4. Action to Recover Fees for "Medical Services."**—In Bibber v. Simpson,[162] the issue was whether a clairvoyant could recover her fee for treatment of a human ailment. The evidence showed that she examined, diagnosed and prescribed for the patient, and also gave him a half hour seance. In denying the right of the clairvoyant to recover her fee, the Maine Court declared that the "services rendered were medical in character, and that the state medical practice act prohibits anyone

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161. See Gladstone v. Galton, 145 Fed. (2d) 742 (1944).
162. 59 Maine 181 (1871).

but a licensed physician to recover compensation for medical services." In a similar case,[163] a Mrs. M. had a reputation as a fortune teller, conjuror and "doctor." R., who was very sick, called Mrs. M. to treat him. She gave him a dose of spirits of turpentine and oil. Later she visited R. several times, and stayed with him about two hours each time, giving him "conjuring" treatments. R. gave Mrs. M. his note for $250.00 for this treatment. In holding this note void, the Florida court averred that "conjuring over a sick man to make him well is not a valid consideration for a promissory note; and no man with a healthy mind would voluntarily give a note for $250.00 . . . for the services of a conjuror who proposes to cure a lingering disease by conjury or incantation." Incidentally, the treatments given by the fortune tellers in both of these cases constituted a violation of the local medical practice act.

**5. Malpractice.**—In Nelson v. Harrington,[164] one N. took his fifteen year old son, the plaintiff, who had a serious ailment on his right hip joint, to the defendant, a spiritualist and clairvoyant physician, for treatment. The defendant went into a voluntary trance condition, and while in such a condition, diagnosed the ailment as rheumatism, and prescribed and encouraged the boy to walk frequently, and also advised that walking was beneficial. The plaintiff followed the instructions of the defendant for almost five months during which time the plaintiff suffered great pain and distress. While the plaintiff's ailment was getting worse, the defendant constantly asserted that the plaintiff was improving. As a result of such treatment, the plaintiff lost the full use of his leg, and will be a cripple for life. The medical testimony was that the diagnosis of the defendant was wrong, and that the plaintiff was suffering from a disease of the hip joint. In affirming a judgment for the plaintiff (suit was brought on his behalf by a guardian ad litem), the Wisconsin Supreme Court averred: "One who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in

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163. Cooper v. Livingston, 19 Fla. 684 (1883).
164. 72 Wisc. 591, 40 N. W. 228 (1888).

an abnormal condition, in like manner takes the risk of the quality or accuracy of such influences or intuition. If these move him so imperfectly or inaccurately that, although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences. . . . The law does not concern itself with . . . the reality or nature of such alleged occult influence or intuition which controls the (spiritualist and clairvoyant) physician in his treatment of his patient. It only takes cognizance of the question, 'Did the practitioner or expert render the services he undertook in a reasonably skillful manner?' That question, as applied to the defendant, the jury, upon sufficient proofs, have answered in the negative. . . . Negligence cannot properly be imputed to the father of the plaintiff because he employed the defendant to treat his son, with full knowledge of the defendant's methods of diagnosis and prescription. At least, the defendant cannot be heard to charge the father with negligence in that behalf."

**6. Calling One a Witch**

**a. Libel.**—In the case of Oles v. Pittsburgh Times,[165] the defendant newspaper published the following article:

"EXCITEMENT OVER ALLEGED WITCHCRAFT

"The parents of a little boy and the neighbors attribute . . . a nervous malady to the evil influence of an old woman (the plaintiff).

"(The boy, age 12, was sitting) . . . in a chair . . . at his home . . . when his head fell forward on his breast, and he pitched to the floor . . . (and) was found in spasms. Later he frothed at the mouth and barked like a dog. (The boy's parents) as well as many other neighbors believe that the boy is possessed of the devil, and that an old woman (the plaintiff, who peddled home made remedies among the poorer classes) is responsible for his peculiar behavior (as she often visited their home).

"(The parents) . . . will receive no strangers in their home, and no one at all after the sun goes down. This they believe is to be required of them by the witches.

"(A neighbor of the parents) said that a wild looking colored man had been seen in consultation with the

165. 2 Pa. Super. Ct. 130, 38 W. N. C. (Pa.) 461 (1896).

plaintiff." In affirming a judgment of $600.00 for the plaintiff, the Pennsylvania court stated that there "was ample evidence to warrant the jury in finding especially the following facts: . . . First, there is and was a considerable number of persons living in the community where the plaintiff resides, and where the newspaper containing this alleged defamatory article had a large circulation, who believed in witchcraft. Second. The publication had a tendency to produce and assisted in producing in the minds of the persons entertaining such belief the further belief that . . . the (plaintiff), was a witch, and to produce in the minds of some such the belief that the malady which the . . . boy was suffering was a possession of devils for which the plaintiff was responsible. Third. In consequence of this belief, she was subjected to insults and assaults, was hooted at, called witch, and stoned upon the streets, was shunned by her neighbors, and suffered a loss in her business and occupation. . . . (Because) of the superstitions of the masses of the people . . . being called a witch would be calculated to injure the reputation of another and injure her standing in society, then it becomes libellous and becomes the foundation for damages." The court further pointed out that if "this was an article read in the society of learned men who did not believe in such things as witchcraft, or that there were such things as witches, probably it would have no effect at all; they would not believe it, and it would do no harm."

**b. Slander.**—While in a tavern, S., a farmer, told the assembled company the following story: A woman from the neighboring farm had appeared at his stable door, and had requested the use of a graip. In the momentary interval which elapsed while he sought the implement asked for, the woman vanished as suddenly as she had come, and S., with a surprise which soon turned to consternation, saw in her place a brown hare which after an unhurried scrutiny of the horror-stricken S., turned and leisurely loped off across the fields. The faculty of transformation into an animal form has always been an accepted tradition of witchcraft, and S.'s story deeply impressed his audience. S. frequently repeated his story which readily gained currency and credence for miles around. The plaintiff, who was the woman mentioned in S.'s story, filed an action of slander against S.

in the Sheriff's Court. Her cause of action was predicated upon the ground that calling one a witch is slander. The defense was that the imputation was absurd. The sheriff held that the "belief in witchcraft is still, to a considerable extent, a popular superstition in Gigha" (Scotland), and the plaintiff as a result of the story told by S. "became the common talk of those among whom she dwells, as a person dealing in witchcraft," and that S.'s story did cause much injury to the plaintiff's feelings and also to bring her character into bad repute. "In a district (as here) where a belief in witches is still part of the popular creed, for a woman to get the character of one . . . is to render her an object of suspicion and avoidance, and the accredited author of half the mischief that may befall her neighbors." The plaintiff obtained judgment for 10 pounds.[166]

166. Witch of Gigha, 55 Scot. L. Rev. 331-3 (1939).

## CHAPTER II

### II. Faith Healing, Legal Aspects

#### A. Introduction

**1. Scope.**—This chapter covers the criminal and civil legal aspects of faith healing. The criminal aspects of this tenet deals with the question of the conflict of the practice of faith healing with the several public health statutes and medical practice acts, the criminal responsibility of faith healers and also that of parents and other persons in custody or charge of infant children, dependents, invalids and aged persons, who neglect to furnish them with the necessary medical care. The civil aspects of faith healing stresses the legal rights, remedies and liabilities of Christian Scientists.

**2. Definitions**

**a. Faith Healing.**—A tenet which consists of the belief and the practice of the treatment of all human ailments, injuries, diseases, pain and suffering by spiritual and religious means, that is by prayer which is accompanied by meditation and exhortation and frequently with "positive" mental reasoning.

**b. Faith Healer.**—One, who holds himself out to the public as having the power, supernatural or divine, to cure all human ailments and suffering with faith healing treatments, and devotes himself to such practice.

**3. History.**—"After the adoption of Christianity by Rome and the conversion of the greater part of Europe, there commenced a growth of legends of miracles connected with the lives of great men who became benefactors of humanity. Some of these have been canonized by the (Catholic) church, and are today looked upon by a large portion of the Christian world as saints who had miraculous power. The great majority of miracles recorded had reference to the healing of the sick through Divine intervention, and so extensively was this belief rooted in the minds of the people that for a thousand years or more it was considered dishonorable to practice physic or surgery. At the Lateran Council of the (Catholic) church, held at the beginning of the thirteenth century, physicians were forbidden, under pain or expulsion from the church, to undertake medical treatment without

calling in a priest; and as late as two hundred and fifty years thereafter Pope Pius V renewed the commands of Pope Innocent by enforcing the penalties. The curing by miracles, or by interposition of Divine Power, continued throughout Christian Europe during the entire period of the Middle Ages, and was the mode of treating sickness recognized by the church. This power to heal was not confined to the Catholics alone, but was also in later years invoked by Protestants and by rulers. We are told that Henry VIII, Queen Elizabeth, the Stuarts, James I and Charles I, all possessed the power to cure epilepsy, scrofula, and other diseases known as the king's evil; and there is incontrovertible evidence that Charles II, the most thorough debauchee who ever sat on the English throne, possessed this miraculous gift in a marked degree, and that for the purpose of effecting cures he touched nearly a hundred thousand persons.

With the commencement of the eighteenth century a number of important discoveries were made in medicine and surgery which effected a great change in public sentiment, and these have been followed by numerous discoveries of specifics and drugs and compounds. These discoveries have resulted in the establishment of schools for experiments and colleges throughout the civilized world for the special education of those who have chosen the practice of medicine for their profession. These schools and colleges have gone a long way in establishing medicine as a science, and as such it has come to be recognized in the law of our land. By the middle of the eighteenth century the custom of calling upon practitioners of medicine in case of serious illness has become quite general in England, France and Germany, and, indeed, to a considerable extent throughout Europe and in this country. From that time on the practice among the people of engaging physicians has continued to increase until it has become to be regarded as a duty, devolving upon persons having the care of others, to call upon medical assistance in case of serious illness."[1]

At present, "it is undisputed that medicine, as a science, is now, and has been for a long period of time, generally recognized by law, and the efficacy of medical treatment by a skilled and competent physician is uni-

1. People v. Pierson, 176 N. Y. 201, 207-9, 68 N. E. 243 (1903).

versally conceded."[2]

4. **Conflict with Public Health.**—"The common faith of mankind relies not only upon prayer, but upon the use of means which knowledge and experience have shown to be efficient. And when the results of this knowledge and experience have been crystalized into legislative enactments, declarative of what the good of the community requires in the treatment of disease, and of the qualifications of those who publicly deal with the disease, anything in opposition thereto may fairly be taken as injurious to the community. Our laws recognize disease as a grim reality to be met and grappled with as such. To secure the safety and protect the health of the public from the acts of incompetent persons (such as faith healers), the law prescribes the qualifications of those who shall be allowed to attempt the cure or healing of disease. It is not for the purpose of compelling the use of any particular remedies, or of any remedies at all. It is only designed to secure competent service for those who desire to obtain medical attendance. In certain diseases the individual affected may be the only one to suffer for the lack of proper attention; but in other types, of a contagious or infectious nature, they may be such as to endanger the whole community, and here it is the policy of the law to assume control and require the use of the most effective known means to overcome and stamp out disease which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat, by those (faith healers) not possessing lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer (faith healing) alone, in the cure of disease, is for the parties who invoke such a remedy. But this is not wholly true. 'For none of us liveth to himself, and no man dieth to himself,' and the consequence of leaving disease to run unchecked in the community is so serious that sound policy forbids it. Neither the law, nor reason, has any objection to the offering of prayer for the recovery of the sick. But in many cases both law and common sense require the use of . . . (medical care) for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the

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2. State v. Chenoweth, 163 Ind. 94, 99, 71 N. E. 197 (1904).

blessing of restored health, even when we have faithfully and conscientiously used all the means known to science and the art of medicine."[3]

As thus clearly indicated, faith healing, when used in lieu of medical care, constitutes a grave menace and danger to the public health, particularly when infectious and contagious diseases are concerned. For this reason, as well as others, the Pennsylvania[4] and Missouri[5] courts have viewed with strong disfavor, and have even condemned any institution which encourages the growth and spread of faith healing. At present, the law is well established that as a matter of public policy that the proper public authorities may restrict and even prohibit the practice of faith healing if it in any way should endanger the public health, particularly in time of epidemics.[6]

**B. Criminal Aspects**

**1. Medical Practice Acts**

**a. In General.**—Practically all of the civ-

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3. First Church Christ, Scientist, 205 Penn. 543, 550-1, 55 Atl. 536 (1903). "Contemplate the effect on the community if a scourge of small pox or yellow fever should fall upon it and the people should submit themselves to the care of magic (faith) healers," instead of physicians. "The State has an interest in the mental and physical condition of its every citizen." Bennett v. Ware, 4 Ga. A. 293, 305, 61 S. E. 546 (1908).
4. Christian Science church denied incorporation. First Church Christ, Scientist, supra.
5. School for training Christian Science practitioners denied incorporation. In re St. Louis Institute of Christian Science, 27 Mo. A. 633 (1887).
6. State v. Probst, 165 Minn. 361, 206 N. W. 642 (1925). "The state has the right, and it is its duty, to protect the public against all contagious, infectious, and communicable diseases . . . (An . . . adult person . . . has no right . . . in case he is afflicted with a communicable disease, to expose any other persons to such disease. . . . In such cases, afflicted persons and faith healers) . . . must submit to the law. If such were not the case, the aim and efforts of state and local health boards to minimize, and if possible, to stamp out, communicable diseases would be nullified. . . . The aim of the bodies aforesaid, with the help of the law, is to make it possible for all who are born to more nearly live out their natural expectancy of life. . . . The potent fact remains that in the last twenty-five years the frightful death rate of children from diphtheria and of adults from malaria, typhoid, yellow fever, etc., has been greatly reduced. . . . If the present statute, in connection with proper quarantine regulations, is properly enforced, society will at least be protected against the spread of communicable diseases." State Board of Medical Examiners v. Freenor, 47 Utah 430, 449-51. 154 Pac. 941 (1916). Prince v. Massachusetts, 321 U. S. 158, 166-7 (1944).

ilized countries of the world, and particularly all the states of the United States have medical practice acts.[7] In substance, these acts, for most part, are quite similar. They define what constitutes the practice of medicine, state in detail the educational requirements and training which are necessary for a license to practice medicine, and contain penal provisions which subject persons, who have failed to comply with or have violated any of its provisions, to either a fine or imprisonment or both.

**b. Purpose.**—The main purpose of these medical acts is to protect the public "health and promote the welfare of society, and to protect it from imposition and fraud; . . . (and to) prohibit and punish fraud, deception, charlantry and quackery in the practice of the profession of medicine,—to prevent empiricism, and bring the practice of medicine under such control that, as far as practicable, the ignorant and unscientific practitioner should be excluded."[8] These acts also seek to protect the general public "from being treated in their physical ailments and diseases by persons who have not adequate or proper training, education or qualifications to treat them."[9]

**c. Exemptions.**—Most medical practice acts expressly exempt from its penal provisions those "persons who endeavor to heal or cure the sick or suffering by prayer or spiritual means or as an exercise of the tenets

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7. "Such enactments emanate from that branch of the police power of the state having to do with the protection of public health." Smith v. People, 51 Col. 270, 274, 117 Pac. 612 (1911).

8. People v. Blue Mountain Joe, 129 Ill. 370, 377-8 (1889). "While the state may not deem it wise to go to the extent of requiring the individual to avail himself of the services of a physician, yet it may not wish to hasten his death and so transfer to itself the burden of supporting those dependent upon him by making it possible for him to employ an empiric. Again where there is an infectious or contagious disease the public welfare may be vitally affected by a failure promptly to recognize it, and so the state is interested in permitting to practice the art of healing only those persons possessing recognized qualifications. So that, regarding disease rather than the treatment of it as the subject of the legislation, it is not necessary that the statute be preventive of particular practices, but it may make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications." State v. Marble, 72 Ohio St. 21, 36-7, 73 N. E. 1063 (1905).

9. People v. Cole, 219 N. Y. 98, 109-110, 113 N. E. 790 (1916).

of their religion."[10] A number of these acts specifically exempt Christian Scientists, clairvoyants and spiritualists.[11] The acts of a few states even go so far as to exempt mental healing and magnetic healing. However, in most states, these acts expressly or impliedly make both mental healing and magnetic healing unlawful. It has been held in a New York case[12] that in order to come within the exemption, the practice of faith healing must be conducted as part of the tenet of an organized church as distinguished from persons who practice faith healing in accordance with their own individual belief. Appearing in accord with this ruling are a few states whose acts specifically prohibit "faith cures" by such individual practitioners. On this point, however, the courts of several states have held otherwise.[13] In order to come within the statutory exemption, the practice of faith healing must be conducted honestly and in good faith,[14] and it must be exclusively spiritual and religious, and confined solely to prayer, silent or audible.[15]

**d. Application**

**(1) Persons subject.**—As most faith healers are usually uneducated, untrained, incompetent, avaricious charlatans, quacks and quasi-fortune tellers[16], many of them, some of various cults, such as Christian Science practitioners,[17] spiritualist healers,[18] clairvoyants,[19] conjuror,[20] Christian Philosophy healer,[21] Altru-

10. See provisions of the local medical practice acts. Such express religious exemption has been declared to be valid under the Federal Constitution. Crane v. Johnson, 242 U. S. 339, 343-4 (1917).
11. Clairvoyants and spiritualists are granted similar exemption in the fortune telling statutes of a number of states.
12. People v. Cole, 219 N. Y. 98, 113 N. E. 790 (1905).
13. Bennett v. Ware, 4 Ga. A. 293, 61 S. E. 546 (1908); State v. Bd. Med. Ex. v. Maxwell, 13 N. J. Miscl. 855, 181 Atl. 694 (1935); State v. Miller, 216 Ia. 806, 249 N. W. 141 (1933).
14. People v. Cole, supra.
15. Ibid. People v. Klinger, 292 Ill. A. 321, 11 N. E. (2d) 40 (1937); State v. Mylod, 20 R. I. 632, 40 Atl. 753 (1898).
16. See Ch. I, B, 2 and footnote numbers 43 and 70.
17. State v. Buswell, 40 Neb. 158, 58 N. W. 728 (1894); State v. Marble, 72 Ohio St. 21, 73 N. E. 1062 (1905) overrules Evans v. State, 9 Ohio Dec. 222 (1889).
18. People v. Krause, 291 Ill. 64, 125 N. E. 726 (1920); People v. Vogelsang, 221 N. Y. 290, 116 N. E. 977 (1917); People v. Moser, 176 Ill. A. 625 (1913).
19. Commonwealth v. Lindsay, 223 Mass. 392, 111 N. E. 869 (1915); Bibber v. Simpson, 59 Maine 181 (1871); Commonwealth v. DeLon, 219 Mass. 217, 106 N. E. 846 (1914); People v. Kenyon, 201 Mich. 647, 167 N. W. 997 (1918).
20. Dictum, Cooper v. Livingston, 19 Fla. 684 (1883).
21. People v. Cosper, 76 Cal. A. 597, 245 Pac. 466 (1926).

rian Society healer,[22] Church of Illumination preacher,[23] Christian Divine Revelation pastor,[24] Seventh Day Adventist clergyman-naturapath,[25] vitapathic scientific healer,[26] "gifted" healer,[27] psychic healer,[28] magnetic healers,[29] mental healers,[30] and sundry others[31] have been convicted in many states for violations of these acts.

**(2) Use of physical means.**—A faith healer is subject to the penal provisions of the several medical practice acts if he also makes use of any of the following physical agencies or means: makes a diagnosis of the patient's ailment, injury or disease,[32] gives treat-

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22. Fealey v. City of Birmingham, 15 Ala. A. 367, 73 So. 296 (1916).
23. State v. Verbon, 167 Wash. 140, 8 Pac. (2d) 1083 (1932).
24. People v. Hickey, 283 N. Y. S. 968 (1935).
25. People v. Miller, 59 N. D. 286, 229 N. W. 569 (1930).
26. Smith v. State, 8 Ala. A. 352, 63 So. 28, affirmed in Ex Parte Smith, 183 Ala. 116, 63 So. 70. (1913).
27. King v. Couture, 15 Can. Cr. C. 147 (1909).
28. The defendant was the founder and owner of the Hindu Temple of Science and Health. His circulars advertised that it was the only one of its kind in America, and that he used Yogi philosophy and psychic healing to cure human physical and mental ailments. The evidence showed that he charged fees in treating cases of cancer, neuralgia and catarrh, and that in one case he prescribed a drug. The defendant was indicted for violating the state medical practice act which exempts persons who practice faith healing in accordance with the tenets of their religion. The conviction of the defendant was affirmed. Singh v. State, 66 Tex. Cr. 156, 146 S. W. 891 (1912).
29. Used 'Animal Magnetism,' 'Animal Electricity,' 'Odic Force,' 'Electro-Biological Force,' and 'Vital Magnetism.' People v. Trenner, 144 Ill. A. 275 (1908). Used hypnotism. Parks v. State, 159 Ind. 211, 64 N. E. 682 (1902). People v. Phippin, 70 Mich. 6 (1888); Triplett v. State, 23 Ohio C. C. (N. S.) 172 (1912); State v. Hughey, 208 Ia. 842, 226 N. W. 371 (1929).
30. Mental Science. People v. Gordon, 194 Ill. A. 560, 62 N. E. 858 (1902). State v. Heath, 125 Ia. 585, 101 N. W. 429 (1904). Auto-suggestion. State v. Evertz, 202 S. W. 616 (1918). Suggestive therapeutics. Witty v. State, 173 Ind. 404, 90 N. E. 627 (1910). State v. Pratt, 80 Wash. 96, 141 Pac. 318 (1914); the defendant in this case has made a "superficial adjustment of his practice" of suggestive therapeutics accompanied by laying on of the hands by including prayer in an attempt to "avoid the effects of the former adjudication against his methods." State v. Pratt, 92 Wash. 200, 158 Pac. 981 (1916).
31. Smith v. People, 51 Col. 270, 117 Pac. 612 (1912); State v. Peters, 87 Kans. 265, 123 Pac. 751 (1912); Rex v. Brooks, 9 Brit. Col. 13, 1 B. R. C. 725 (1902); People v. McTier, 184 Ill. A. 635 (1914). "An examination of the record of this case shows without the slightest doubt that the use of prayer by the appellant in the treatment of this patient was a mere subterfuge to escape the prohibitory provisions of the Medical Act." People v. Cosper, 76 Cal. A. 597, 600, 245 Pac. 466 (1926). Sorgen v. State, 36 Ohio A. 281, 172 N. E. 835 (1930).
32. State v. Pratt, supra.

ment based upon such diagnosis,[33] asks pertinent questions of the patient as to his ailment,[34] renders massage[35] and manipulations[36] of the limbs and body of the patient, recommends, prescribes or provides the patient with herbs,[37] liquids,[38] chemical preparations,[39] "medicines,"[40] physical exercises,[41] breathing exercises,[42] uses or recommends any physical instrument or appliance,[43] electric current,[44] applied psychology,[45] gives directions as to food or diet,[46] or directly advises the patient to abstain from necessary medical or surgical care,[47] particularly in infant patient cases.[48]

**(3) Contagious diseases.**—Faith healers may also be prohibited from giving treatments, particularly at certain times and places when they may endanger the public health,[49] and especially if they are violative of statutory quarantine and sanitary regulations.[50]

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33. People v. Cosper, supra; Triplett v. State, supra.
34. Ibid.
35. People v. Gordon, supra; People v. Trenner, supra; Parks v. State, supra; Witty v. State, supra; Sorgen v. State, supra; State v. Hughey, supra.
36. People v. Krause, supra; State v. Peters, supra.
37. State v. Verbon, supra.
38. People v. Trenner, supra.
39. People v. Vogelsang, supra.
40. Commonwealth v. Lindsay, supra; Commonwealth v. DeLon, supra; People v. Kenyon, supra; People v. Moser supra.
41. Williams v. State, 23 Okla. Cr. 434, 215 Pac. 437 (1923).
42. People v. Hickey, supra.
43. Ibid.
44. Smith v. State, supra.
45. People v. Miller, supra; People v. Mulford, 125 N. Y. S. 680 (1910).
46. Regina v. Beer, 32 Canada Law J. 416 (1895); Williams v. State, supra.
47. State v. Karsonsky, 197 Wash. 87, 84 Pac. (2d) 390 (1938).
48. Rex v. Brooks, supra; King v. Couture, supra; 10 A. L. R. 1146-1151.
49. State v. Probst, supra; First Church of Christ, Scientist, supra; State v. Marble, supra.
50. Ibid. See also pertinent provisions in local medical practice acts and public health laws. In the leading case of People v. Robertson, 302 Ill. 422, 426-7, 134 N. E. 815 (1922), Justice Thompson eloquently stated that "the health of the people is unquestionably an economic asset and social blessing, and the science of public health is therefore of great importance. . . . With the increase of population, the problem of conserving the health of the people has grown, and public health officers and boards have been appointed for the purpose of devising and enforcing sanitary measures. That the preservation of the public health is one of the duties devolving upon the State as a sovereign power will not be questioned. Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health.

**(4) For commercial profit.**—Even where the faith healer confines his treatment exclusively to spiritual means, he still may be subject as an offender under the medical practice act when it is shown that he is exploiting faith healing for commercial profit.[51] As was excellently enunciated by a Colorado court:[52] One is not authorized "under the cover of religion or a religious exercise, to go into healing commercially for hire, using prayer as the curative agency or treatment. Religion cannot be used as a shield to cover a business undertaking.[53] . . . The practice of medicine, defined by out statute, means the practice of the healing art commercially, regardless of the curative agency employed. The commercial practice of healing by prayer, followed as a money-making venture or occupation, is the practice of medicine within the plain meaning of the statute." This ruling is particularly applicable to faith healers, who advertise in newspapers[54] and circulars,[55] and pass out cards,[56] and charge a fee for their treatments[57] which they render in an office building, apart from their own

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The duty to preserve the public health finds ample support in the police power, which is inherent in the State and which the State cannot surrender. Every State has acknowledged power to pass and enforce quarantine, health and inspection laws to prevent the introduction of disease, pestilence and unwholesome food, and such laws must be submitted to by individuals for the good of the public. The constitution guarantees that no person shall be deprived of life, liberty or property without due process of law, and that no State shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a State may lawfully be asserted in this any more than in any other connection. . . . Generally speaking, what (sanitary and quarantine) laws or regulations are necessary to protect public health . . . is a legislative question and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review." In Prince v. Massachusetts, 321 U. S. 158, 166-7 (1944), the Supreme Court of the United States declared that the "right to practice religion freely does not include liberty to expose the community . . . to communicable diseases."

51. Smith v. People, 51 Col. 270, 277, 117 Pac. 612 (1911).
52. Ibid.
53. A school for training faith healers was held irreligious and denied incorporation as a religious corporation, because it was founded solely for the pecuniary benefit of its founders and officers. In re St. Louis Institute of Christian Science, 27 Mo. A. 633 (1887).
54. Witty v. State, supra; People v. McTier, supra.
55. State v. Evertz, supra; State v. Heath, supra.
56. Sorgen v. State supra.
57. State v. Marble, supra; State v. Buswell, supra; Smith v. People, supra.

home or the home of their patient or the church edifice.[58]

Even where the faith healer receives a gift or donation from his patient for the treatments rendered, it has been held that such act makes him guilty of a violation of the medical practice act.[59] This ruling was well stated by the Supreme Court of Nebraska[60] in the following words: "The exercise of the art of healing for compensation, whether exacted as a fee or expected as a gratuity, cannot be classed as an act of worship. Neither is it the performance of a religious duty. . . . The evidence . . . convinces us that the defendant (a practicing Christian Scientist) was engaged in treating physical ailments of others for compensation. . . . The object of the statute is to protect the afflicted from the pretentions of the ignorant and avaricious. . . . Under the indictment, the sole question presented, upon the evidence, was whether or not the defendant within the time charged . . . had professed to heal, or prescribe for or otherwise treated, any physical or mental ailment of another. There was involved no question of sentiment, nor of religious practice or duty. If the defendant was guilty as charged, neither the pretense of worship, nor of the performance of any other duty should have exonerated him from the punishment which an infraction of the statute involved."

**2. Fortune Telling Statutes.**—Faith healers have been indicted, tried and convicted for violations of the fortune telling statutes of the several states.[61]

**3. Obtaining Money Under False Pretenses.**—Faith healers have also been criminally prosecuted and convicted for obtaining money under false pretenses.[62]

**4. Omission to Furnish Medical Care**

**a. Infant children**

**(1) In general.** — Under the law, medicines and medical attention furnished to an infant, when his health or physical condition requires them, are necessaries because they answer the bodily needs of the infant.[63] By the law of Nature, as well as the common

58. People v. Cole, supra. In these cases, the faith healer usually retains all the fees which he receives, and his church receives nothing nor even a portion of the fees.
59. State v. Buswell, supra; State v. Marble, supra.
60. State v. Buswell, 40 Neb. 158, 169-170, 58 N. W. 728 (1894).
61. See Ch. I, B, 2.
62. See Ch. I, footnote numbers 99, 104, 105.
63. See local statutes on Prevention of Cruelty to Children. These statutes make it a criminal offense for a parent or other person who has the custody of an infant to harm or neglect it, particularly in cases of failure to supply it with necessaries. 31 Corpus Juris 1079, 14 Ruling Case Law 258.

law, and independently of statute, it may generally be stated that parents are under an obligation to care for their young in sickness and health, and to do whatever may be required for their care and maintenance, including medical attendance if necessary. The failure to provide such medical care is a public wrong, and if the infant child is injured from such omission, the parent can be convicted of the criminal neglect of his child;[64] should the child die as a result of such neglect, the parent would be guilty of manslaughter.[65] The law is the same in such cases, even though the neglect of the parents was due entirely to their superstitious or conscientious opinions that it is wrong and irreligious to provide medical care for their children or themselves.[66]

In other words, the law may be stated to be that a parent, guardian, relative or any other person,[67] who has the custody of an infant "who is unable, by reason of . . . age . . . to withdraw himself from such charge, (is under a duty) to supply that (infant) . . . with the necessaries of life, medical attention included, and that where one by reason of his religious belief fails to provide medical treatment for a child, he may in case of the death of the child be convicted of manslaughter."[68] In order to sustain a manslaughter conviction in these cases,

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64. Oakey v. Jackson, L. R. 1 K. B. (1914) 216; Owens v. State, 6 Okla. Cr. 110, 116 Pac. 345 (1911).

65. State v. Staples, 126 Minn. 396, 148 N. W. 283 (1914); Stehr v. State, 92 Neb. 755, 139 N. W. 676 (1913); State v. Barnes, 141 Tenn. 469, 212 S. W. 100 (1919).

66. 29 Corpus Juris 1159-1160; 10 A. L. R. 1146. "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." Prince v. Massachusetts, 321 U. S. 158, 166-167 (1944).

67. The head of a religious community was prosecuted for manslaughter because of his failure to provide medical care to a fifteen year old boy, who as a member of his community, was under his domination. The defense was that the tenet of the religion of this community was that medical treatment was not efficacious and hence unnecessary. This religious leader was convicted of manslaughter for causing the death of the boy. On appeal, the conviction was reversed solely on a technical error of the trial judge. State v. Sandford, 99 Me. 441, 59 Atl. 597 (1905).

68. 29 Corpus Juris 1159-60, 10 A. L. R. 1137-1152. Queen v. Senior, L. R. 1 Q. B. Div. (1899) 283; Rex v. Lewis, 6 Ont. L. R. 132, 1 B. R. C. 732 (1903); Commonwealth v. Breth, 44 Penn. Co. Ct. 56 (1915); Commonwealth v. Hoffman, 29 Penn. Co. Ct. 65 (1903); Wharton on Homicide (1907 Ed.) # 452; Queen v. Morby, L. R. 8 Q. B. Div. (1882) 571.

it is necessary for the medical testimony to show that the neglect to obtain medical care had the effect of shortening the life of the child or accelerated or caused its death, and that medical care would have prolonged or preserved its life.[69]

Although a physician need not be called in "for every trifling complaint with which the child may be afflicted . . . the standard for determining whether there has been a criminal medical neglect is (at what time and occasion) would an ordinary prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician."[70]

**(2) Medical neglect causing injury.**— As previously stated, where the failure to furnish necessary medical care to an infant child causes injury to him, the parent, or any other person, who has his custody, can be convicted of criminal neglect. This rule was specifically enunciated in the English case of Oakey v. Jackson.[71] There an information was preferred against the defendant under the Children's Act. This Act makes it a misdemeanor for parents, who neglect their children under sixteen, by failing to provide them with adequate medical care whereby such child is caused unnecessary suffering or injury to its health. The defendant's daughter, age thirteen, had for some time been suffering from adenoids which caused her mental dullness, impaired breathing, deafness and anaemia, and the child was consequently suffering injury to health. The only possible remedy was a surgical operation which the defendant, although requested to do so, refused to allow. The defendant did not believe in operations (which was obviously due to his belief in faith healing). On an appeal from a ruling in favor of the defendant, an English Court held that the father could have been properly convicted because he was under a legal obligation to allow the operation, "particularly when its necessity was advised by a qualified medical practitioner. . . . It is not neces-

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69. Queen v. Morby, supra.
70. People v. Pierson, 176 N. Y. 201, 205-6, 68 N. E. 243 (1903).
71. L. R. 1 K. B. (1914) 216, 83 L. J. (K. B.) 712. In a criminal prosecution against a father for failure to furnish his sick infant child with medical care under a statute "unlawfully deprive of necessary sustenance," it was held that the word, "sustenance," strictly construed, meant food and victuals, and did not include within its meaning medicines or medical care. Justice v. State, 116 Ga. 605, 42 S. E. 1013 (1902).

sary to know much about surgery to know that the operation for the removal of adenoids is very common in the case of children, and that a failure to perform the operation may result in danger to the child's life if the child should ever happen to be attacked with illness."

Likewise in accord is the leading American case of Owens v. State.[72] There the defendant, a father, was indicted for wilfully omitting, without lawful excuse, to furnish medical attendance to his minor daughter who had been afflicted with typhoid fever for a period of two months. The county health officer and other physicians as well as the neighbors of the defendant entreated him to permit medical care to be given his child. He refused to do so even though the medical treatment was offered without expense. His refusal was due to his religious belief. In affirming the conviction of the defendant of a misdemeanor, the Oklahoma court declared: "Under the statute . . . persons will not be permitted to allow innocent children, dependent upon them, to suffer from lack of necessary . . . medical attendance. The law contemplates the administering of such aid for the protection of the health, as well as the life, of the child."

To ensure prompt and adequate medical and surgical care to infant children, several states have recently enacted specific statutes for the protection of children within their territorial jurisdiction, and which authorize the proper courts to order prompt and adequate medical and surgical care for children in proper cases.[73] These statutes are quasi-criminal in nature because where there is a criminal neglect of an infant on the part of the parents or any person having custody, the State, as parens patriae, through its courts has the right to invade such custody for the purpose of compelling performance of a parental obligation to furnish the infant with medical care. These statutes have been liberally construed to effectuate their purpose by the courts to have children examined psychiatrically and physically to determine what is best for the child medically,[74] and also to provide appliances and devices which are necessary to physically handicapped children.[75]

In the recent and leading pertinent case, In re

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72. 6 Okla. Cr. 110, 116 Pac. 345 (1911).
73. 43 Corpus Juris Secundum, p. 64-65.
74. In re Rotkowitz, 25 N. Y. S. (2d) 624 (1941).
75. Orthopedic shoes, In re Lewis, 15 N. Y. S. (2d) 708 (1939).

Vasko,[76] a two year old child had a glioma of the retina of the left eye. Medical testimony was that unless the eye was surgically removed, its malignant nature would continue its growth and cause the death of the child, but that cures had been effected in about fifty per cent of these cases. The parents arbitrarily had refused to permit the operation upon the grounds that "God gave them the baby, and God can do what he wants, . . . and (that they) would rather have the child as she is now." Acting under the authority of a statute which provides that whenever a child appears to the court to be in need of medical or surgical care, a suitable order may be made for the treatment of such child, the court, in granting an order permitting such surgical operation, declared: "It was the intent of the Legislature to invest the court with wide powers of discretion, to be exercised on the advice of competent or surgical authority, uninfluenced by the whims (of religious fanaticism) or arbitrary determination of parents or guardians, in advancing the well-being of the child. . . . The authority of the court to order essential medical or surgical care of a sick child is pursuant to a valid statutory enactment. . . . With the world-wide recognition of the scientific character of the practice of medicine, we come as near to a stage of certainty in result as is humanly possible. . . . The State has the power to direct that an infant be subjected to medical and surgical treatment despite parental objections when from neglect or abitrary reasons such treatment is not furnished." In a similar case[77] which dealt with the same statute, a New York court asserted: "When the Legislature clothed this court with the power to make an order for surgical care, it cannot be said that an order is to be made only when the parents consent to such order. . . . (Such order) would be permissive in the face of opposition of both parents. . . . It was the intention of the Legislature to give power to the Justices of this Court to order an operation not only in an instance

76. 263 N. Y. S. 552 (1933).
77. The child had a deformity of the right lower extremity which was induced by poliomyelitis. Surgery was advised four years ago, and the condition has become worse. The medical testimony was that an operation was necessary to prevent further deformity and immobility and for correction of the condition existing. The father is opposed to such operation but gave no reason, while the mother is in favor of such operation. The court entered an order for the operation. In re Rotkowitz, 25 N. Y. S. (2d) 624 (1941).

where the life of the child is to be saved but also in instances where the health, the limb, the person or the future of the child is at stake. . . . The law is zealous in the protection of . . . and has a special regard (for) the . . . physical well-being of children. . . . There are parents, however, who because of ignorance or (religious) prejudice or neglect, and sometimes even viciousness, are either incapable or unwilling to do the things necessary for the protection of their own offspring. There are parents who will by act do that which is harmful to the child and sometimes will fail to do that which is necessary to permit a child to be prepared to lead a normal life in the community."

In an unusual borderline case,[78] the Supreme Court of Washington reversed an order of a juvenile court which directed that a surgical operation be performed on an infant. In this case, the facts were these: A girl, age eleven, has a badly deformed quasi-elephantiasis of her left arm. It has caused her untold embarrassment, difficulty and has also prevented her from attending school. Her mother had engaged a "divine healer" who had "treated" the girl for four years. An adult sister complained to the juvenile court that the child was in need of medical care. At the trial, the medical testimony was that amputation of the deformed arm was advisable, although dangerous, because the arm was a constant menace to the health and life of the child. The mother testified that she did not have any religious scruples against the amputation, but declared that in view of the danger of the operation, she would refuse to consent because she would not assume the responsibility of her daughter not surviving the operation. The State of Washington has no such specific infant medical statute as is in effect in New York. The court predicated its decision not to sustain the order of the juvenile court which allowed such amputation, chiefly upon a quasi-moral reluctance to assume responsibility for the death of the child in the event she failed to survive an admittedly hazardous surgical operation. From the labored reasoning of this decision, it appears that the court might have upheld the order of amputation if the operation was not a dangerous one or that it was absolutely necessary to save the life of the child. However, there was a strong and

78. In re Hudson, 13 Wash. (2d) 673, 126 Pac. (2d) 765 (1942).

well reasoned dissenting opinion in this case which held that the order of amputation should have been sustained, because the child "had never had any medical or surgical treatment for her deformity," and that therefore she was a neglected and dependent child under the statute; that therefore the juvenile court possessed the power to order the required medical and surgical treatment as medical services reasonably required are necessaries. "Medical services are necessary, and a child who is not furnished such services is destitute. The right to the custody of a child is ordinarily in the parents, but it is not an absolute or inalienable right. . . . The State, as parens patriae, has a superior right of guardianship over all minors within its jurisdiction." The welfare and physical well-being of the child outweighs and is paramount to the right of custody. When this duty on the part of the parents to furnish medical care to their infant children is breached, the State, as parens patriae, has the right to invade the custody for the purpose of compelling the performance of the parental obligations.

"Since the essence of all children's laws is to insure the well-being of the child, any parental objection which would jeopardize this objective, . . . (as) in this instance, parental displacement of the child's interest for personal interest, constitutes such violation of duty as to forfeit the right of custody. . . . On the grounds of unfitness of the parent or of the destitution of the child, the court can declare the child dependent, and enter any order which is conducive to its health and well-being."

(3) **Medical neglect causing death.**—In general, the various jurisdictions are in accord with the rule that where medical neglect causes the death of an infant child, the parent or person, who is charged with its custody, is guilty of manslaughter.[79]

(a) **England.**—In the leading case of Queen v. Senior,[80] the prisoner was the father of an eight month old infant who had died of diarrhea and pneumonia. The prisoner had not provided his child with any medical care because he was a member of a sect

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79. 10 A. L. R. 1137-1152.
80. L. R. 1 Q. B. (1899) 283, 19 Cox C. C. 219. In accord. Queen v. Downes, L. R. 1 Q. B. Div. (1875) 25, 13 Cox C. C. 111. In a case similar to the facts of the Senior case, an English Judge delivered the following summation: "You are not to be carried away by feeling of respect for conscientious objection . . . (to

called the "Peculiar People," which believed in faith healing and disbelieved in physicians or medicine. The medical testimony was that medical assistance would have in all probability have saved the life of the child. The prisoner was indicted under a Prevention of Cruelty to Children Act, which read: "If any person . . . who has the custody, charge or care of any child . . . wilfully . . . neglects . . . such child . . . in a manner likely to cause such child . . . injury to health, that person shall be guilty of a misdemeanor." In affirming the father's manslaughter conviction, the eminent Chief Justice Lord Russell declared: "The (meaning of the) words in the statute, 'wilfully neglects' . . . is very clear. 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. 'Neglect' is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind —that is, in such a case as the present. . . . At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect. Mr. Sutton (counsel for the prisoner) contended that because the prisoner was proved to be an affectionate parent, and was willing to do all things for the benefit of his child, except the one thing which was necessary in the present case, he ought not to be found guilty of the offense of manslaughter, on the ground that he abstained from providing medical aid for his child in consequence of his peculiar views in the matter; but we cannot shut our eyes to the danger which might arise if we were to accede to that argument, for where

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medical care). It is not because people think that they are right in breaking the law that they are to be protected. I tell you that they ought to have called in medical aid, and it was a crime not to do it." Both parents were convicted of manslaughter. Regina v. Cook, 62 J. P. 712 (1898). The Senior case nullified the contrary rulings in Regina v. Wagstaffe, 10 Cox C. C. 530 (1868) and Regina v. Felton, 33 L. J. N. C. 563 (1898). In commenting upon the Felton case, an English law writer stated rather bitterly that the "judges have been fairly stern in declaring, but lenient in enforcing the law, (and thus) . . . encourage these worthy Folks (Peculiar People) in their efforts to keep down the infant population." 33 L. J. N. C. 563 1898).

is the line to be drawn? In the present case, the prisoner is shewn to have had an objection to the use of medicine; but other cases might arise, such, for instance, as the child with a broken thigh, where a surgical operation was necessary, which had to be performed with the aid of an anaesthetic; could the father refuse to allow the anaesthetic to be administered? Or take the case of a child that was in danger of suffocation, so that the operation of tracheotomy was necessary in order to save its life, and an anaesthetic was required to be administered. . . . Conviction . . . affirmed."

**(b) Canada.**—Likewise in accord with the preceding authoritative English case is the principal Canadian case of Rex v. Lewis.[81] Here, the defendant was a Christian Scientist. He was the father of a six year old boy. The boy was ill with diphtheria and subsequently died of the disease. During the time that the boy was ill, he was given Christian Science treatments by a Christian Science "demonstrator." The prisoner, a man of financial means, admitted that if he had not been a Christian Scientist, he would have called in a physician. He was indicted under the criminal code for failing to supply necessaries for his son, that is, medical care, and he was convicted of manslaughter. In affirming the manslaughter conviction, the Ontario Court of Appeals averred: "No matter how earnestly a parent might believe in the efficacy of Christian Science treatment as developed in Mrs. Eddy's handbook of the doctrines of the sect, yet if they (the jury) came to the conclusion that medical aid and treatment was necessary, they ought also to find that it would not be furnished by means of mental treatment by a Christian Science 'demonstrator'. Persons sui juris may by mutual consent, and within certain limits, practice upon each other what experiments of this kind they please. . . . But it would be shocking if in case of infants or others incapable of protecting themselves, they and the community in which they lived were to be exposed to the danger from contagious or infectious diseases which the instructed common sense of mankind in general does not as yet

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81. 6 Ont. L. R. 132, 1 B. R. C. 732 (1903). Another Canadian case in accord is Rex v. Brooks, 9 Brit. Col. 13, 1 B. R. C. 725 (1902).

find or admit to be curable by means only of subjective or mental treatment. . . .

"While the merits or demerits of the Christian Science or faith (healing) are things with which we have nothing to do so long as it does not transgress or lead to a transgression of the law, the law of the land is paramount, and it is not for people to set themselves up in opposition to it; that the law of the land must be obeyed, and it must be obeyed even though there be something in the shape of belief in the conscience of the person which would lead him to obey what in his state of mind he may consider a higher power or higher authority. And especially must there be obedience where, as in this instance, the subject of the judgment to be exercised is a child of tender years, unable to exercise any judgment of his own. In one form or another it has been frequently said by able judges, and it cannot be too widely known or too often repeated, that where an offense consists of a positive act, which is knowingly done, the offender cannot escape punishment because he holds a belief which impels him to think that the law which he has broken ought not to exist or ought never to have been made."

**(c) United States.**—Also in accord with the rulings of the English and Canadian authorities on this point are all the American courts with only a single exception.[82] In the prominent New York case of

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82. The contrary viewpoint was expressed in Bradley v. State 79 Fla. 651, 84 So. 677 (1920). This case hinged upon the interpretation of a statute which made the killing of a human being by culpable negligence to be manslaughter. In this case, the defendant's daughter was an epilepetic under sixteen years of age. While in a paroxysm which was occasioned by this malady, she suddenly became unconscious, fell in the fire, and was seriously burned. Her pain and suffering were so great that she soon became insane. For the next three weeks, she received no medical care despite the fact that she was in great pain and constantly crying from the agony of the burns. The defendant's relatives and acquaintances pleaded with him to obtain a doctor for his suffering daughter. The defendant refused to do so, because he was a strong believer in faith healing, and believed it would cure his daughter. Shortly thereafter, his daughter died, and he was indicted under the statute for causing the death of his daughter, and was convicted of manslaughter. On appeal, the Florida Supreme Court in an argumentative and self-contradictory decision, devoid of all legal reasoning, reversed the conviction upon the ground that the phrase 'culpable negligence' did not cover an omission to furnish medical care, because a statutory definition of a fel-

People v. Pierson,[83] the defendant had a sixteen month old daughter, who contracted whooping cough, which afflicted her for thirty days, when catarrhal pneumonia developed, and caused her death three days later. The defendant testified that forty-eight hours before the child died, he observed that her symptoms were of a dangerous character, but that he did not send for or call a physician to treat her, although he was financially able to do so. His reason for not calling in a physician was that he was a member of a faith healing sect, known as the Christian Catholic Church, the teachings of which denied the need of medical aid, and that his religion led him to believe that the child would get well by prayer. The defendant was indicted under a statute for wilfully omitting "to furnish medical attendance to a minor." The defendant was convicted of a misdemeanor. In affirming the conviction, the Court of Appeals of New York asserted: "The peace and safety of the State involve the protection of the lives and health of its children as well as obedience to its laws. . . . Children, when born into the world, are utterly helpless, having neither the power to care for, protect, or maintain themselves. They are exposed to all the ills to which the flesh is heir, and require careful nursing, and at all times, when danger is present, the help of an experienced physician. . . . A person . . . cannot, under the belief or profession of (religious) belief that he should be relieved from the care of children, be excused from punishment for slaying those who have been borne to him." Although the father was convicted of only a misdemeanor, a legal commentator stated that is does not appear why the father in this case "was not indicted for manslaughter."[84]

In two Pennsylvania cases, in which the facts of both cases were similar to the Pierson case, the conviction of the father on manslaughter charges in each case was affirmed; in its reasoning for its decision, one Pennsylvania court[85] declared: "If the case of sickness be such that ordinary prudence would suggest the services of a

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ony should not by judicial interpretation be extended to cover acts or omissions not clearly within its terms. However, there was a strong dissenting opinion which held that the manslaughter conviction should have been affirmed, and cited and discussed with approval pertinent English, Canadian and American cases in support of its reasoning.

83. 176 N. Y. 201, 68 N. E. 243 (1903).
84. 10 A. L. R. 1139.
85. Commonwealth v. Hoffman, 29 Penn. Co. Ct. R. 65 (1903).

physician and the use of proper medicines, then such services and medicines would be necessaries in that case, and failure to employ one and use the other, if reasonably within reach, would be negligence on the part of the person on whom the duty rested, and if by reason of such neglect, on the part of the father, the death of a child ensues, he would be guilty of manslaughter." In the other Pennsylvania case,[86] the court stated that the father cannot relieve himself of his legal duty to provide medical care to his child, "because of some religious or conscientious belief. In no instance is this more true than in the case of a helpless infant unable to take any action for its own assistance or relief and incapable of exercising judgment as to what should be done. . . . If persons were permitted to plead, as giving them immunity for acting contrary to enactments of law, their religious belief, . . . the whole policy of the state relative to health laws would be defeated."

Also in accord are the Maine,[87] Missouri,[88] Georgia,[89] and Indiana[90] courts. In a pointed opinion, the Supreme Court of Indiana[91] averred that it "is certainly true that the conduct (of the defendant) . . . in wholly refusing to secure the assistance of a physician, or to have any medicine administered to his helpless minor child in its sick condition, in order that its life might either be preserved or prolonged, should be condemned and punished by law. It is undisputed that medicine, as a science, is now, and has been for a long period of time, generally recognized by law, and the efficacy of medical treatment by a skilled and competent physician is universally conceded. The religious doctrine or belief (of faith healing) of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land."

The attitude of an aroused judiciary towards these infant faith healing murder cases is well expressed in these pungent words of a Georgia Judge:[92] "The ignorant

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86. Commonwealth v. Breth, 44 Penn. Co. Ct. R. 56 (1915).
87. In State v. Sandford, 99 Me. 441, 59 Atl. 597 (1905), the conviction was reversed on a technicality.
88. Strong dictum. Kansas City v. Baird, 92 Mo. A. 204, 211 (1902).
89. Bennett v. Ware, 4 Ga. A. 293, 305, 61 S. E. 546 (1908).
90. State v. Chenoweth, 163 Ind. 94, 71 N. E. 197 (1904).
91. Ibid, 163 Ind. 94, 98-99.
92. Justice Powell, Bennett v. Ware, 4 Ga. A. 293, 305, 61 S. E. 546, (1907).

and superstitious parent who takes his child, critically ill, to a . . . (faith) healer, when he should seek the advice and treatment of some skilled physician, and thereby lets it die, has done the perpetuation of the race the same injustice as if he had taken a knife and stabbed the child to the heart. . . . The State has an interest in the mental and physical condition of its every citizen."

**(d) Faith healer as accessory, etc.** —In those cases where the infant child dies while under faith healing treatment, the faith healer can be convicted as an accomplice or as an accessory before the fact or even as a principal[93] on manslaughter charges if in addition to prayer he made use of any physical means or agencies[94] or advised the parents that medical or surgical care was unnecessary for the child.[95]

**b. Other Dependent Relationships.** — The rule that it may be manslaughter to omit to perform a legal duty is applicable in cases of failure on the part of a person, charged with the custody and care of a helpless, insane, dependent, invalid or aged person, to provide necessary medical care.[96] To render a person guilty in such case, he must be under a legal duty imposed by law[97] or contract[98] or by the relationship of the parties[99] to take care of the dependent. It is also neces-

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93. R. was the father of two children under six years of age. He was a member of the Catholic Christians of Zion whose teachings prohibit recourse to medical aid in the event of sickness. When both of his children became ill with diphtheria, and although he knew it was a dangerous disease, and had the means to pay for medical care, he refused to call in a doctor because of his religious belief. R., and one B. who assisted counselled and induced R. to omit medical care for his children, who as a result, died shortly thereafter, were both indicted and convicted of manslaughter. Upon appeal, both convictions were affirmed. Rex v. Brooks, 9 Brit. Col. 13, 1 B. R. C. 725 (1902). In Rex v. Elder, 35 Manitoba 161, 44 Can. Cr. C. 75 (1925), and Regina v. Beer, 32 Can. L. J. 416 (1895), faith healers were acquitted because they confined their treatments solely and exclusively to prayer.
94. See Chap. II, B, 1, d (2).
95. Rex v. Brooks, supra.
96. 10 A. L. R. 1143-1145.
97. Ibid
98. Woman taking care of invalid for compensation. People v. Montecino, 66 Cal. A. (2d) 85, 152 Pac. (2d) 5 (1944). Woman providing care for baby for compensation. Rex v. Jones, 19 Cox C. C. 678 (1902).
99. Niece, aged 35, and invalid aunt, aged 73. Reg. v. Instan, 1 Q. B. (1893) 450, 62 L. J. Mag. Cas. N. S. 86. Master and apprentice, Reg. v. Smith, 8 Car & P. 153 (1837). Employer and minor employee, Reg. v. Brown, 1 (Can.) Terr. L. R. 475 (1893).

sary that such person be guilty of gross negligence in not furnishing medical care, that the medical neglect must have caused the death of the dependent, that the former had the means and the ability to furnish the medical care, and that the dependent must have been unable to help himself.[100] A religious belief in faith healing is not a defense in such cases for medical neglect.[101] In other words, the law as previously stated as being applicable to infants in cases where the omission to provide medical care causes injury as well as death, is likewise applicable in such dependent relationship cases.[102]

**c. Adults Sui Juris.**—As to an adult sui juris, (except of course in cases of infectious and contagious diseases), "there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other considerations."[103] (Adult) "persons . . . may by mutual consent, and within certain limits, practice upon each other what experiments of . . . (faith healing) they please."[104] From these two citations, it appears that under the law an adult, who is possessed of sufficient age, intelligence and independence, can rely upon a faith healer for treatment, and while under such faith healing treatment, should his ailment or injury become aggravated or should he die, then despite the proof of medical neglect, the faith healer is not criminally liable. This rule however, is subject to two exceptions: the first being cases of infectious and contagious diseases,[105] and the second where the faith healer makes use of any physical means or agencies.[106]

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100. Reg. v. Instan, supra.
101. 29 Corpus Juris 1159-60, 10 A. L. R. 1146-50.
102. Ibid.
103. People v. Pierson, 176 N. Y. 201, 212 (1903).
104. Rex v. Lewis, 6 Ont. L. R. 132, 141, (1903).
105. First Church Christ, Scientist, supra; State v. Probst, supra.
106. The deceased was suffering from a severe attack of grippe. To cure the deceased, the defendant gave him some hog-hoof tea, fever powder, made application of the hands, together with prayer and incantation that the pain from the body of the deceased be transmitted to that of the defendant. The medical testimony was that the treatment of the defendant was detrimental to the health of the deceased, and that the defendant was grossly ignorant of the disease and how it should be treated. The defendant was prosecuted under a statute for killing one by an act of culpable negligence. In affirming the manslaughter conviction, the Oklahoma court stated that the defendant . . . "having assumed to treat

### 5. Use of the Mails to Defraud.

**a. In General.**—Under the Federal statute[107] making it a criminal offense to use the United States post office for fraudulent purposes, it is a criminal offense to send through the mails letters, circulars and advertising matter with the purpose of defrauding the public. This Federal statute was designed to strike at common schemes of fraud in which the mails are used,[108] and covers fraudulent "representations as to the past or present, or by suggestions and promises as to the future."[109] In most of the following cases, it will be noted that the faith healers, who were involved, sought to promote a faith healing sect or business through a quasi-mail-order organization, and in their advertising incorporated various elements of divinition and of the supernatural to build up its attractiveness and appeal. This topic covers three groups of cases. The first deals with the promotion of a faith healing sect; the second concerns itself with the sale of a faith healing physical item; and the third deals with mental healing.

**b. Promotion of a Sect.**

**(1) "Newthot Science."**—In New v. United States,[110] the defendant, Mr. New, represented to the public that he had acquired a physical supernatural state of immortality by a course of righteous conduct which consisted in the abstinence of meat, intoxicating liquors, profane language, evil desires, telling falsehoods, and that such supernatural power had enabled him to conquer disease, death, poverty and misery. New offered to transmit this alleged power to others who were willing to accept his teachings and pay for them. New also pretended that he was of divine origin and birth, a son of the Holy Ghost, that the mantle of Jesus had fallen upon him, and that he had received the keys of the kingdom. New also claimed that he was the classic

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him (the deceased) for disease, the defendant was bound to know the nature of the remedies he prescribed and the treatment he adopted, and he is responsible criminally for the death resulting from gross ignorance and culpable negligence in such relation." Barrow v. State, 17 Okla. Cr. 340, 188 Pac. 351 (1920). See also Chap. II, B, 1 d, (2).

107. 18 U. S. C. A. No. 338.

108. Wharton's Criminal Law, Vol. 3, # 2200, p. 2493. U. S. v. Calwer, 292 Fed. 1007, 8 (1923).

109. 41 Am. Juris. 780-1.

110. 245 Fed. 710 (1917); certiorari denied, New v. U. S., 246 U. S. 665 (1918).

Nordic type with blond hair, blue eyes and fair complexion. New's religion was entitled the Newthot Science. It included the proposed establishment of a Newthot Church with an attached printing plant for the purpose of publishing one hundred books which New represented that he had written, the establishment of a university which would offer seventy free $100.00 scholarships, supposedly to have been endowed by a millionaire, and those who secured such scholarships would be only required to pay $10.00 for enrollment and $5.00 more on graduation, and that New, as Archbishop of the Newthot Church, would have the power to bestow the titles of healer, pastor and bishop upon such university graduates. New was indicted for the fraudulent use of the mails in the promotion of his new sect. At the trial, the evidence showed that New was an imposter, a heretic, money-mad, that he was the author of only one small book which consisted only of a compilation of platitudes and garbled extracts from other works, that he was a habitual indulger in each and every one of the sins and practices that he pretended to condemn, a seeker of vainglory, and a coveter of his neighbor's goods and wife. His conviction was affirmed upon the grounds that he used the mails as a means to obtain money in pursuance to a grossly fraudulent scheme with the intent to defraud.

**(2) "The Great Exorcism."**—In Crane v. United States,[111] the defendant was the founder of a new religion which he called the "Great Exorcism." He claimed that all human ailments, mental and physical, are attributed to mysterious influences, which he could cure with "Christ power," and that prayer, purity and fasting were useless in preventing illnesses which were caused by the taint of such influences. His treatment consisted of advising the patient to relax, breathe deeply, and with every outgoing breath, say that he is unloading all his cares upon the defendant, and that he wants nothing, knows nothing, believes nothing, resists nothing, and that the defendant will do all the resisting, and that the patient will soon breathe in perfect harmony and vitality. The defendant represented in his literature, which was distributed to the public, that such treatments were free. However, after the first or second treatment by mail, the defendant would then send a letter to his

111. 259 Fed. 480 (1919).

patient asking for a "sacrifice." At the trial, the evidence showed that the main work of the defendant contained lurid details about thirteen devils, and that the defendant kept a bank account under the name of Aallwyn's Law Institute. The Federal court held that the defendant's representations were fraudulent and intentionally false, and were not honestly made in good faith nor mere errors of judgment, and that "one with a corrupt purpose may devise a scheme to defraud by employing an alleged mental power to relieve suffering of mind or body, and may use the mails to carry out his corrupt scheme."

**(3) Miracle Worker.**—In United States v. White,[112] the defendant, through advertisements in magazines and newspapers, represented to the public that by communicating to him through the mails that they could obtain instructions from him on how they might acquire occult and supernatural powers. He offered free his "Red Book" which he claimed a student could learn in his spare time such subjects as Spiritualism, Hypnotism, Willism, Magnetism, Selfism, Mental and Magnetic Healing, White and Black Art, become a miracle worker, and enable him to treat diseases, mold the human will, and cause one to have love, wealth, happiness and prosperity. To those who made written inquiries, he offered a booklet entitled "Blessings to All Mankind" which he represented was the basis of his correspondence course, which would teach one to be a Spiritualist, Magnetic Healer, Clairvoyant and Hypnotist, and thus give the student the "greatest power between heaven and earth." This course he offered in his first letter for $7.00. If this letter did not bring results, the defendant sent a second letter in which he stated that he was personally interested that the inquirer take the course. If this letter also failed, his third letter would be mailed, and it would state that from the handwriting of the inquirer, he had discovered that the party had a wonderful mediumistic influence and possessed wonderful power for the cure of all diseases. His fourth letter offered the course for $5.00; and his fifth letter for $3.00. In connection with his correspondence course, the defendant prepared a cheap paper of imitation parchment, which he represented to be pure parchment and that certain charms could be written upon it to prevent evil, cause success and cure

112. 150 Fed. 379 (1906).

diseases, which he sold for a $1.00 a yard. The defendant also printed in large quantities twelve circulars of the twelve signs of the zodiac, and offered a special life reading for $1.00. To those inquiring, he sent one of the printed forms which covered the month of the birth of the inquirer. This life reading would reveal the complete future so that one would know what was in store for him, how to avoid all future trouble, worry and mistakes, and thus make life a grand success. The defendant was convicted for use of the mails to defraud.

(4) **"I AM Movement."**—The "I AM Movement" had been in existence about two decades, and its founder, Guy W. Ballard, had died, when his widow and son, who were carrying on the leadership of the sect, were indicted for use of the mails to defraud.[113] The facts in this case show that the Ballards made the following representations in the letters which they sent through the mails. That Guy W. Ballard, now deceased, alias Saint Germain, Jesus and George Washington, had been designated by the "ascended master," Saint Germain, to transmit his words to mankind through the medium of Ballard and, after his death, through Ballard's wife and son, who by reason of their alleged high spiritual attainments and righteous conduct had been selected as divine messengers through which the words of the alleged "ascended masters" would be communicated to mankind under the teachings commonly known as the "I AM Movement." The Ballards represented that they had the power to cure by faith healing all kinds of human ailments and diseases, including those classified by the medical profession as incurable, and had cured hundreds of persons. The Ballards also claimed that the alleged religious experiences described in certain "I AM" books, particularly those in "Unveiled Mysteries" and "Magic Presence," were true; and also that the phonograph records, which were sold by them, would bestow on the purchasers great blessings and rewards in their aim to achieve salvation. At the trial, the judge had instructed the jury that the religious beliefs of the Ballards were not in issue, but only whether they honestly and in good faith believed in their representations. The Ballards were found guilty, and on appeal, the Supreme Court of the United States reversed the conviction, although it admitted that the Ballards

113. United States v. Ballard, 322 U. S. 78 (1944).

had been given a fair trial. In the majority opinion which was written by Justice Douglas he asserted that the teachings of the Ballards contained "nothing but humbug, untainted by any trace of truth," and that they were "catering to . . . (the present American religious taste) . . . with a pretty dubious product," and that the "religious views espoused by . . . (them) might seem incredible, if not preposterous to most people." The case was remanded for trial with the ruling that the inquiry into the truth of certain happenings and powers of the Ballards in connection with their "I AM Movement" would encroach upon the field of religion, and that the issue before the jury was not as to the truth of the claimed happenings or the powers of the Ballards, but as to the Ballard's belief in them. In 1945, the Federal Circuit Court of Appeals[114] affirmed the convictions of the Ballards in a subsequent trial, but on the appeal to the Supreme Court of the United States,[115] the conviction was reversed solely on the point that women were excluded from the jury in the trial of this case.

**(5) Neological Foundation.**—In U. S. v. Carruthers,[116] the defendant organized the Neological Foundation. Its purpose was to disseminate the philosophy of right living through right thinking. He claimed to have been a doctor of medicine, a doctor of divinity, and a monk at the Kum Bum Lamasery in Tibet. To some he administered to their physical needs, and to others he gave mental solace. He delivered many lectures at meetings and also over the radio. At one time, his Neological Foundation had a membership of over 4,000 "students," each of whom paid him dues of $2.00 per month. He gave lessons in breathing and silence as based on the ancient Yoga creed. Later, he undertook to market a laxative, named "Happy Hearts," and solicited a large number of his "students" to loan their money to him for investment. The defendant was convicted of using the mails to defraud.

### c. Sale of a Faith Healing Item

**(1) In General.**—The law that it is unlawful for a faith healer to use any physical agencies

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114. Ballard et al v. U. S., 152 Fed. (2d) 941 (1945).
115. Ballard et al v. U. S., 329 U. S. 173 (1946).
116. 152 Fed. (2d) 512 (1945). Writ of Certiorari denied. 66 Sup. Ct. 805.

or means is also applicable to those faith healers who endeavor to sell physical items which they represent can effect faith healing cures.

**(2) Blessed handkerchief.**—In U. S. v. Schlatter,[117] the defendant, a divine healer, represented that he had cured many people of various diseases, and that he would bless a handkerchief which if it were applied by a sick person to the afflicted portion of his body, a cure would be effected. The "contribution" to be given for the handkerchief was to be left to the judgment of the party seeking to be cured. The defendant was indicted for using the mails to defraud. In the indictment it was alleged that the representations of the defendant were false and made with the intent to defraud. The indictment was upheld, and the demurer to the indictment overruled.

**(3) Cosmic faith healing generator.**—In Nehr v. Harwood,[118] the plaintiff filed an injunction suit to remove a fraud order of the Postmaster General. The plaintiff's business consisted of furnishing to customers a service which consisted of placing a prayer card which contained the customer's name in a machine called the cosmic generator which gathered from the ether Positive Cosmic Affinity which the customer's prayer card would absorb, and would cause the body of the customer, although far away, to absorb Negative Cosmic Affinity. This action, it was claimed, together with faith, prayer, and auto-suggestion would result in cures. The injunction was denied.

**d. Mental Healing.**—In the prosecutions of mental healers for use of the mails to defraud, the sole issue in such cases is whether fraud was practiced by the mental healer in the procurement of money through the mails. Thus in Post v. U. S.,[119] the defendant, an ex-Christian Scientist, established a mail order business which was devoted to healing by mental science, devoid of any pretense of divine or supernatural power. She advertised herself as a mental science healer and represented that she could cure all human ailments, injuries, diseases, old age, poverty, bad habits and drunkenness. She pub-

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117. 235 Fed. 381 (1916).
118. 128 Fed. (2d) 846 (1942). The case of Acret v. Harwood, 41 Fed. S. 492 (1941) involved the same fraud order and the same decision was rendered.
119. 135 Fed. 1 (1905).

lished several books and pamphlets on the subject, and had about 8,000 patients. She also taught mental science to classes of students. Her business increased to such an extent that she had several assistants who were her former students. There was evidence that her assistants did most of the work, and that the defendant was acutely interested in the financial returns. In reversing her conviction, the court declared that the "practice of mental healing is, in federal law, lawful. . . . But the use of the mails in furtherance of an artifice or scheme to defraud, under the guise of practicing the vocation of healing is equally condemned by law. . . . If without belief in her professions or proposed treatment, and with knowledge that her representations were false, she made them to defraud, the fact that mental healing is a lawful vocation does not protect her," and held that this point was a question for the jury to decide. A similar ruling was enunciated in the case of American School of Magnetic Healing v. McAnnulty.[120] In this case, the plaintiff corporation, was engaged in the business of healing diseases and ailments of the human family, and teaching the science of healing human ills. It erected several large buildings, and large sums were expended to advertise its business. The plaintiff did a heavy mail order business from all over the world, receiving about 3,000 letters a day, and averaging about $10,000.00 a week. Its treatment consisted of practical scientific mind healing without the use of any divine healing or Christian Science. The Postmaster General issued a fraud order on the mail of the plaintiff. The United States Supreme Court held that there was no proof of actual fraud on the part of the plaintiff in its business, but merely an expression of opinion, the falsity of which is undeterminable, and granted the plaintiff the injunctive relief requested.

It should be noted that the Post case and the McAnnulty case were decided over forty years ago. At the present time, most of the medical practice acts make magnetic healing, mental healing and "mind cures" unlawful.[121] Therefore, in most states magnetic healers and mental healers would now be convicted of a violation of the medical practice act even if they conducted their practice wholly or partly by correspondence through the

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120. 187 U. S. 94 (1902).
121. See cases cited in preceding footnote numbers 29 and 30.

mails.[122] It should also be noted that the American School of Magnetic Healing was a business corporation which was engaged in the commercial practice of healing. The law is now well settled that a corporation cannot engage in the commercial practice of medicine.[123] There is no doubt that under present medical practice acts the American School of Magnetic Healing would be convicted for engaging in the unlawful commercial corporate practice of medicine.[124]

**6. Defense of Constitutional Religious Freedom.**—Whenever a faith healer is prosecuted for violation of the medical practice act or fortune telling statute or for omission to furnish medical care or obtaining money under false pretenses or for use of the mails to defraud, the defense of constitutional religious freedom is always raised. On this point, however, the law is well settled. Although the government may not interfere with mere religious belief and opinions,[125] it can prohibit and punish religious practices which are criminal offenses.[126] Since either a violation of a state medical practice act or fortune telling statute or obtaining money under false pretenses or using the mails to defraud is a criminal offense, it can readily be seen that a faith healer whose practices make him guilty of such an offense may not raise the defense of constitutional religious freedom.[127] This rule is also applicable in cases which involve omission to furnish medical care, particularly to infants by parents.[128]

### C. Civil Aspects (Christian Science)

**1. General Introduction.**—The civil aspects of faith healing deals almost entirely with cases which involve Christian Scientists, insofar as their legal rights, remedies and liabilities are concerned. For this reason, and also because almost all the cases analyzed and discussed under this topic concern Christian Scientists, only

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122. Ibid. See local medical practice acts.
123. People v. Medical Service, Inc., 362 Ill. 442, 200 N. E. 157 (1936).
124. Ibid. See Ch. II, B. 1, d, (4).
125. A belief in faith healing is not unlawful. State v. Mylod, 20 R. I. 632, 40 Atl. 735 (1898); People v. Cole, 219 N. Y. 98, 113 N. E. 790 (1916).
126. Davis v. Beason, 133 U. S. 333, 342-3 (1889); Reynolds v. U. S., 98 U. S. 145, 167 (1878); State v. Marble, 72 Ohio St. 21, 32, 73 N. E. 1062 (1905); Ch. I, footnote number 127.
127. Ch. 2, B. State v. Marble, supra; State v. Buswell, supra.
128. People v. Pierson, supra; Commonwealth v. Breth, supra.

those cases which deal with Christian Science will be treated in the main body of the text. All the other cases, which involve members of other faith healing sects under this topic, will be further treated in the footnotes with an occasional brief reference in the body of the text.

**2. Definition of Christian Science and Its Practice.**—Christian Science generally is known as a form of faith healing and mental therapeutics. It was founded by Mary Baker Eddy of Concord, New Hampshire, in the year 1886, and bases its teachings upon her writings, the most important of which is "Science and Health, With Key to the Scriptures." This work, popularly known as the Christian Science textbook, is simply a quasi-medico legal re-interpretation of the Bible as understood by Mrs. Eddy. Its theology is based upon the idea that all human ailments, injuries, diseases, pain and suffering have no real existence, but are merely false beliefs, illusions or "error of mortal mind" which can be destroyed by "Truth" through the operation of "Divine Mind" by knowing such to be the truth. It is the application of this fundamental doctrine of Christian Science in the form of prayer and mental argument by Christian Scientists and Christian Science practitioners to themselves and to men, women and children who are actually suffering or who merely "believe" that they are suffering from some mental or physical ailment, injury or disease, which constitutes the practice of Christian Science.

**3. Belief in Christian Science.**—The apparent irrationalism of Christian Science has led to several cases in which the legal rights and remedies of Christian Scientists have been questioned and even denied by the courts.

**a. Testamentary Capacity.**—Matter of Brush[129] was decided in New York in 1901. In this case, the testatrix was a Christian Scientist. In her will she left a legacy of $20,000.00 to the First Church of Christ, Scientist, of New York City. Her relatives sought to have the legacy set aside upon the ground that her belief in Christian Science was an insane delusion, and that therefore she lacked testamentary capacity. The court decreed that the legacy was valid, and held that "however opposed these teachings (Christian Science) may be to the beliefs

129. 72 N. Y. S. 421.

or notions of others, they are founded on the religious convictions of those professing them. This being so, the court cannot say that these persons (Christian Scientists) are mentally unsound." The rule laid down in this case is that a belief in Christian Science is not an insane delusion. Although the general rule is that a belief in faith healing is not an insane delusion,[130] yet where such belief is permitted to occupy the mind, the latter may assume the chronic condition of the delusion which when it controls and dictates the conduct, and subverts and sets aside the individual judgment, will and conscience, then the victim of such condition is a monomaniac, and in such cases his belief in faith healing is an insane delusion.[131]

**b. Qualification as a Juror.**—In re Malvasi's Estate[132] was decided in California in 1929. This case was a will contest which was concerned with the unsoundness of the mind of the testator. Mrs. Post, a Christian Scientist, was examined as a juror in this case and was accepted. She joined with the other jurors in upholding the will. Later, counsel for the contestant discovered that Mrs. Post was a Christian Scientist, and made a motion for a new trial on the ground that as a Christian Scientist, Mrs. Post did not believe in the existence of unsoundness of mind because it was a human disease, and that therefore she was disqualified as a juror. In an affidavit against the motion, Mrs. Post deposed that Christian Science was a healing agency, and that it at all times recognized the existence of human disease, including mental incompetency. The court denied the motion, stating that Mrs. Post, according to her "conception" of Christian Science, "understood" Christian Science to recognize the existence of disease, including mental in-

130. Ibid; Spencer v. Spencer, 221 S. W. 58 (1920).

131. In Ingersoll v. Gourley, 78 Wash. 406, 139 Pac. 207 (1914), the testator believed that one G., the leader of a sect called the "Saints of the Lord," had superhuman faith healing powers. G.'s preaching was so intensely emotional that often his followers would become infected with his "power," and roll on the floor, become rigid and even lose consciousness. As a result of relying on G.'s faith healing treatment, the cancer on the testator's face horribly ravaged it, and caused his death. It was held that the testator's belief in faith healing was an insane delusion. In Taylor v. Trich, 165 Penn. 586, 30 Atl. 1053 (1895), it was held that where the testator has a very extreme belief in faith healing, it may be a question for the jury to determine as to whether he is a monomaniac.

132. 96 Cal. A. 204, 273 Pac. 1097.

competency, and that therefore Mrs. Post was not disqualified as a juror, and was also "not chargeable with any misconduct for failure to volunteer information concerning her religious belief and that appellant (contestant) was not deprived of a fair and impartial jury." There can be no doubt that if Mrs. Post had the true conception of Christian Science, which is the non-existence of all human ailments, injuries and diseases, the court certainly would have ruled that she was disqualified as a juror in this case. Thus it can be seen that Christian Scientists are disqualified as jurors in personal injury cases, and in all other cases in which human ailments, mental suffering and mental anguish are the issues involved.

**c. Recovery for Personal Injuries and Mental Suffering.**—Probably the most interesting case that was ever decided on Christian Science is the case of Fort Worth & Denver City Ry. Co. v. Travis.[133] This case was decided by the Texas Court of Civil Appeals in 1907. Here the plaintiff brought suit to recover damages for his wife's personal injuries and mental suffering which was caused by her expulsion from the defendant's train. At the trial, the defendant's lawyer sought to cross-examine the plaintiff's wife to prove that she was a Christian Scientist and therefore was incapable of sustaining physical injury and mental suffering because of her belief. The trial judge sustained the objection of the plaintiff to this cross-examination, and a judgment of $190.00 was awarded to the plaintiff. Upon appeal, the judgment was reversed, the court ruling that the trial judge "erred in treating the inquiry as an immaterial one, since the testimony was pertinent to the main and essential issue in the case, to-wit, the mental and physical suffering of the witness (plaintiff's wife). If she had such control of her feelings, or thought she had, as to render her insensible to pain when she willed to be, we see no reason why that circumstance should not have been considered by the jury in determining the extent of her suffering and the compensation to be made on account of it." In substance, the holding in this case is that Christian Scientists can recover little or no damages for personal injuries, mental anguish, pain and suffering. This rule also is applicable to those cases in which a Christian Scientist brings suit for breach of promise, alienation of affections, seduction,

133. 45 Tex. C. A. 117, 99 S. W. 1141.

slander, libel and other suits of like character in which damages for mental suffering or mental anguish is the gist of the action. Notwithstanding the harshness of the effects of this ruling on Christian Scientists, it represents the majority viewpoint.

A concrete illustration of the justness of the Travis ruling is shown in the recent insurance case of Barco v. Penn. Mutual Life Insurance Company[134] which was decided in 1942. A Mr. Barco, a lawyer, had purchased a life insurance policy from the defendant insurance company. While the policy was in full force, he became totally disabled on 25 April, 1938, and continued so disabled until his death on 10 October, 1939. If notice of his disability had been communicated to the defendant company, in accordance with the terms of his policy, within six months after 25 July, 1938, he would have been entitled to monthly disability payments, waiver of the premiums, and the death benefits subsequently payable. No notice of his disability was given to the defendant company until July, 1939. Mr. Barco failed to pay the premium due in June and July of 1938; he surrendered his policy for cancellation, and was paid its cash value. "The reason assigned for Mr. Barco's election to deal with his policy in this manner was that he was a sincere believer in the Christian Science faith; that, although he knew he was totally disabled, he could not conscientiously consider himself to be incurably sick; and, presumably, that under these circumstances the act of claiming total and permanent disability would have done violence to his religious precepts and conscience." A year after the surrendering of his policy, Mr. Barco filed suit to compel the reinstatement of his policy. After his death, his wife pressed this suit against the defendant to obtain the benefits accrued under the policy. In affirming a finding for the defendant company, the Federal Circuit Court of Appeals averred: "(Mr. Barco's) rights to the disability benefits uninhibited by his religious beliefs, ripened upon the continuance of his recognized disability for a period of three months, conditioned only upon the giving of timely notice thereof. His religion did not interfere with his duty to give notice of his disability to the insurer, which was a condition precedent to the recovery of disability benefits."

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134. 126 Fed. (2d) 56 (1942). Certiorari denied by the United States Supreme Court. 317 U. S. 637 (1942).

The minority viewpoint, which was expressed in an Alabama case,[135] prohibits cross-examination of a plaintiff as to his belief in Christian Science in personal injury cases. In this case, the plaintiff, a Christian Scientist, testified that he did believe in the existence of physical pain, and that he suffered pain as a consequence of the injuries received. No issue was raised as to medical care. The court refused to permit the plaintiff to be cross-examined on the question as to whether Christian Science taught that there is no such thing as pain, and that pain existed in the imagination only. In allowing recovery on the part of the plaintiff, the court stated that "whatever may be the doctrine of the Christian Scientists on this subject (of pain), we know that sensible bodies do suffer pain, and the examination was well stopped with plaintiff's avowed belief in the fact. Any transcendental religio-philosophical belief that plaintiff may have in general entertained in respect to the possible complete subjection of the material to the spiritual did not affect his character for truth and veracity, nor did the entertainment of such speculative belief amount to an affirmance of fact contrary to the plaintiff's evidence." The reasoning of the court for its decision in this case is paradoxical. Like the juror in the previously mentioned Malvasi case, the plaintiff in this case did not have the true conception of Christian Science which is the non-existence of pain and suffering.

### 4. Negligence in Failing to Obtain Prompt Medical Care

**a. In General.**—One who has sustained personal injury through the fault of another is under a duty to secure promptly the necessary medical and surgical treatment, if the nature of the injury is such as reasonably to require it, so as to prevent or reduce the aggravation of physical injury and mental suffering. If the injured party is negligent in allowing an unreasonable length of time to elapse between the date of the injury and the time medical and surgical care is resorted to, such negligence is regarded in the eyes of the law as a sufficient intervening cause, and may either bar in toto or reduce to a minimum the amount of damages that can be recovered from the party at fault.

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135. City of Montgomery v. Wyche, 169 Ala. 181, 53 So. 786 (1910).

**b. Adult Christian Scientists.**—The case of Ash v. Barker et al [136] illustrates how the law applies to an adult Christian Scientist who is negligent in obtaining prompt medical care. This case is a workmen's compensation case, and was decided in California in 1915. The applicant was a middle-aged woman who managed an apartment house. In the course of her employment, she fell from a chair, severely injuring herself. From the date of her accident until forty days later when she terminated her employment because of the unbearableness of her suffering, she relied solely upon Christian Science treatment by a practitioner to cure her injury. Shortly afterwards, she submitted to a surgical operation. The evidence showed that she should have taken the operation immediately after the accident. In holding that she was not entitled to compensation, the Industrial Commission stated that Christian Science treatments are not such as "may be reasonably required to cure and relieve where surgical treatment is indicated by the symptoms. In delaying such surgical treatment for more than two months, applicant not only jeopardized her own interests, but the interest of her employer, and in fact slept upon her rights to demand medical and surgical treatment at the expense of her employer or her employer's insurance carrier." The reason for this decision is quite obvious. The law imposes on an adult Christian Scientist the duty of acting as a reasonable and prudent person would act under the circumstances of this case. Here the applicant knew or ought to have known that her injury was of such a serious nature as to require immediate medical attention. Her failure to take such prompt action immediately after the accident was the primary cause of the serious aggravation of her injuries.[137]

In the following two personal injury cases, adult Christian Scientists received prompt medical first aid

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136. 2 Cal. I. A. C. 577.

137. In accord with the Ash ruling that faith healing treatments cannot be substituted for medical care in workmen's compensation cases, all the authorities on workmen's compensation law are agreed that workmen's compensation benefits are not to be paid for the disability or death of an "employee" under the Workmen's Compensation Act where same is caused, continued or aggravated by an unreasonable refusal to submit to medical or surgical treatment. Workmen's Compensation Law, 2d Ed., Schneider, Vol. 2, No. 496; Honnold's Workmen's Compensation Law, 2d Ed., Vol. 1, No. 137; Corpus Juris, Vol. 71, p. 639.

from a physician for their injury, but the type of injury in both cases was of such a nature that very little could be done for their benefit through medical care, and therefore the subsequent reliance on Christian Science treatment on their part was held not be an intervening cause as would bar recovery. Thus in Adams v. Carlo,[138] the plaintiff, a Christian Scientist, was struck in the back by a steam shovel owned by the defendant. The injury, although severe, merely bruised the plaintiff. He received medical care from two doctors and they both prescribed rest and heat treatment. Thereafter, the plaintiff relied on treatments by a Christian Science practitioner. Later an arthritic condition set in on the right shoulder of the plaintiff. There being no proof made of medical neglect, plaintiff was allowed recovery. Similarly in Christiansen v. Hollings,[139] the deceased, a Christian Scientist, was injured in an auto accident when the collision caused his stomach to bump the steering wheel of his car. He was examined soon after by a doctor who found that he had a weak heart but no objective signs of abdominal injury. The doctor prescribed rest and digitalis. The wife of the deceased followed the instructions of the doctor for six days, and then called in a Christian Science practitioner under whose treatments the deceased died five days later. Recovery was permitted for the death of the deceased. In both of these two cases, it should be noted that there was no proof made of medical neglect on the part of the injured Christian Scientists.

**c. Infant Christian Scientists.**—The law, however, is not so harsh towards infant Christian Scientists of tender years, who have not reached the age of discretion, and who are entirely dependent upon the care given to them by their parents or guardians, who are also Christian Scientists. A case on this point was decided in Connecticut[140] in 1932. Plaintiff, an eight year old girl, was just stepping off the road when she was struck by the defendant's LaSalle sedan which was being driven at a very fast rate of speed. The most serious injury which the plaintiff sustained was a fractured and dislocated pelvis. Plaintiff and her mother were both Christian Scientists. On the day of the accident, a doctor was called;

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138. 101 S. W. (2d) 753 (1937).
139. 44 Cal. A. (2d) 332, 112 Pac. (2d) 723 (1941).
140. Lange v. Hoyt, 114 Conn. 590, 159 Atl. 575.

he gave the plaintiff first aid treatment, and had her taken to the hospital where she was given further treatment. Later in the same day, the plaintiff's mother took her home against the warnings of the physicians in the hospital. For the next twenty-five days, no medical treatment was given to the plaintiff, except some nursing and orthopedic treatments; during this period, the plaintiff was also given Christian Science treatments. The plaintiff brought suit for damages, and her mother brought suit for expenses incurred. At the trial, the evidence showed that the plaintiff had a permanent pelvic deformity which would interfere with normal child birth. The defendant contended that the plaintiff's injury was aggravated by her not having the proper surgical treatment during the twenty-five day period, and that proper surgical care from the beginning would have effected a substantial cure. The court upheld the judgment for the plaintiff, and declared that the "test of conduct on the part of a plaintiff in promoting a recovery from injuries suffered is one of reasonable care and cannot be made to depend upon the idiosyncrasies of personal belief no matter how honestly held. . . . A child of the age of eight years is necessarily dependent upon her parents as regards the steps to be taken to bring about a recovery from an injury, and if she is not herself guilty of negligence or improper conduct, the failure of the parents to take the proper steps to that end, by a parity of reasoning, cannot be such a cause of any portion of the injuries as will defeat a recovery for all the results of the defendant's wrongdoing." The trial judge had instructed the jury favorably for the defendant insofar as the claim of the mother was concerned. In reviewing this point, the Connecticut Supreme Court intimated that such instruction was justified by the facts in this case.

### 5. Civil Actions by Practitioners

**a. For Fees.**—Where a patient engages a Christian Science practitioner for Christian Science treatments, such a practitioner cannot recover his fee for such treatments against the patient or his estate unless his fee is reasonable and proof is made of the actual services rendered.[141] This point is elucidated by a recent Vermont case.[142] There H., a Christian Science practi-

141. Wheeler v. Sawyer, 15 Atl. (Me.) 67 (1888).
142. Kennedy v. Williams, 114 Vt. 54, 39 Atl. (2d) 193 (1944).

tioner, gave treatments to the defendant for his skin disease. The defendant saw H. about four times. H. also claimed that he gave the defendant absent treatments during a five month period. Later H. assigned his claim of $126.00 for treatments rendered to the defendant, to the plaintiff for a cash loan. In finding for the defendant, the Vermont court pointed out that " while he (the Christian Science practitioner) testified that he gave treatments in accordance with the tenets of his Church, yet, when asked to explain just what he did in giving such treatments, his answers were evasive, several not responsive, and several were contradictory. Repeated efforts by the defendant's counsel failed to get any clear-cut or definite statement as to just what he did in the giving of such treatment except that such treatment was some form of prayer. Neither could it be learned how long such treatments took or just when he claimed he gave them. Such uncorroborated testimony is not of a character to compel a verdict for the plaintiff."

However, in order to recover against a third person, that is, one who has not received the treatments, such as a guardian,[143] employer[144] or a casualty insurance, company,[145] the Christian Science practitioner must prove that the third person had agreed to pay him for such Christian Science treatments. In the absence of such an agreement, the practitioner cannot recover his fee even though the third person is legally responsible for the disease, ailment or injury of the patient who received such treatments. The reason generally given in such cases for the non-liability of a third person for such practitioner's fee is because Christian Science treatments are considered as not such as will reasonably relieve and cure a human ailment, injury or disease.[146] This ruling is particularly applicable to personal injury cases and workmen's compensation cases.[147]

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143. Christian Science treatments by a practitioner to an insane person are of no value because no proof can be shown that such treatments will be beneficial or curative. In re Woodward's Guardianship, 173 Ore. 96, 144 Pac. (2d) 490 (1943).
144. Ash v. Barker et al, 2 Cal. Ind. Ac. C. 577 (1915).
145. Ibid.
146. Ibid. The conclusions of a Christian Science practitioner as to the physical or mental condition of a person has no probative force. Waterous v. Columbian Nat. Life Ins. Co., 353 Mo. 1093, 186 S. W. (2d) 456 (1945).
147. Ibid.

**b. For Malicious Prosecution and False Imprisonment**[148]

**c. Libel**[149]

**6. Civil Actions Against Practitioners.**—Dissatisfaction with the results of Christian Science treatments given by practitioners and general distrust of practitioners, together with wrongful conduct on the part of practitioners, have caused patients, their relatives and individuals to institute legal proceedings against practitioners for malpractice, divorce and fraud.

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148. The plaintiff, a "magic" healer, was arrested for practicing medicine without a license in violation of the medical practice act. After a preliminary investigation, he was discharged. Thereupon he brought suit against the defendant, who swore out the warrant, for malicious prosecution and false imprisonment. In his petition, the plaintiff alleged that he heals the sick by placing his hands upon that portion of the body that is affected by pain, and that this magic power to heal is given to him direct from the Lord, and that he merely accepted voluntary contributions for his services. In affirming the dismissal of the petition, the Georgia court declared that while the plaintiff's practice was not in violation of the medical practice act, it "was presumptively an imposition upon the credulity of the public, which might in its consequences result in much injury, and that he was exercising a pretended power of magnetic healing, to the deception of the people, and was obtaining their money in the shape of gifts under false pretenses, and we do not think that the law should permit him to recover damages resulting from a legitimate effort on the part of a citizen to test the legality of his practice." Bennett v. Ware, 4 Ga. A. 293, 61 S. E. 546 (1908).

149. The plaintiffs were a group of men without any scientific education and with very little academic education who were engaged in the practice of magnetic healing. They employed three chief assistants and also a large number of female typists. The plaintiffs advertised extensively and nationally. In their advertisements, the plaintiffs claimed to possess miraculous powers to heal all human diseases of patients, including those thousands of miles away, with the same power that Jesus Christ exercised. The majority of the patients were quite a distance away, and the only communication was by letter. The main instruction in the letters of the plaintiffs was that the distant patient, at a certain hour of the day, should dismiss all disturbing thoughts and bring his mind into a passive condition to receive the influence from the minds of the plaintiffs who at that time would bring their minds to exert the mysterious influence desired. The plaintiffs were making over a $1,000.00 a day from their practice. People by the hundreds, who were suffering from sickness and disease, came to receive the "magic" touch of the plaintiffs, and many went away believing that they had been cured or benefited. The great bulk of the business of the plaintiffs was through their absent treatment which was rendered by correspondence through the mails. They received thousands of letters from patients. In most instances, the plaintiffs' typists alone read the letters from the patients, and answered them with a prepared circular. The defendant wrote a newspaper article in which he denounced the plaintiffs as "miser-

a. **Malpractice.**—The courts are divided as to whether a malpractice suit can be maintained against a Christian Science practitioner. One view holds that because Christian Science treatments are based upon the religious beliefs and opinions of the practitioner, he is therefore not liable for any injurious effects of such treatments to the patient. This view was stated by the New Hampshire Supreme Court in the case of Spead v. Tomlinson[150] in 1904. In this case, the plaintiff, a middle-aged woman, had an attack of appendicitis. She informed the defendant, a Christian Science practitioner, of the nature of her trouble and her dread of a surgical operation. The defendant told the plaintiff that a surgical operation was unnecessary, and that he could cure her with Christian Science treatments. Plaintiff employed the defendant for several days, during which time her illness increased. She finally placed herself in the hands of a surgeon, submitted to a surgical operation, and was cured. The plaintiff brought suit against the defendant for "malpractice and deceit." The evidence showed that the defendant's treatment was injurious to the plaintiff, and that if it had been persisted in, a cure would have been impossible. The court found for the defendant, and stated that one who holds himself out as a Christian Science practitioner, and is employed to treat any human ailment, injury or disease according to the methods followed by such practitioners, is required only to possess the "knowledge" and to exercise the "skill" of the ordinary practitioner, and that there was "nothing here to show that the defendant failed to do so in giving Christian Science treatments to the plaintiff." The court further stated that

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able charlatans." The plaintiffs sued defendant for libel. At the trial it was shown that the hour of treatment, as mentioned in the plaintiffs' letters, would differ in different parts of the country, and also the leader of the plaintiffs had gone on his vacation, and that the absent treatments had been continued very efficiently by the typists without his presence. In finding for the defendant, the Missouri court averred: "The law of libel is not designed to shield one in the practice of an illegal business. . . . If there was anything in the plaintiffs' business, which they called magnetic healing that entitled it to the protection of the law and which was not perceptible to the uninstructed, the burden was on them to show the rationale of it, and failing to do so the court should close its door against them. . . . The business of the plaintiffs, as shown by their own evidence, is of such character as that it is not entitled to protection under the law of libel." Weltmer et al v. Bishop, 171 Mo. 110, 71 S. W. 167 (1902).

150. 73 N. H. 46, 59 Atl. 376.

"it is a matter of common knowledge that honest men, not only have in the past, but do now entertain religious beliefs which appear to the great majority of their fellow-men both unsound and incapable of belief," and that the defendant's representations were not fraudulent, but merely a strong expression of religious opinion which was based on his apparently sincere belief in Christian Science. In accord with this holding is the case of Previn v. Tenacres, Inc. et al.[151] There the plaintiff was afflicted with an "agitated melancholia of the depressive type." Relying upon a pamphlet which was published by the defendant, a Christian Science sanitarium, which stated that ailing persons were healed by spiritual means in accordance with the teachings of Christian Science, the plaintiff paid the defendant the sum of $6,000.00 for such treatments. While the plaintiff was at the defendant sanitarium, its employees in order to compel the plaintiff to eat, keep quiet and be under control, tied the plaintiff by his hands and feet to his bed and chair, applied clamps to his tongue, assaulted him, and used physical force to make him take automobile rides. The plaintiff sued to recover the $6,000.00 which he claimed was procured from him by the false representations of the defendant, and also for damages for personal injuries. In finding for the defendant, the court stated that the defendant exercised reasonable care and used only such force as was necessary to restrain the plaintiff in order to prevent him from harming himself or the employees of the defendant. This judgment in favor of the defendant sanitarium is erroneous, however, on the following two specific grounds: First, the $6,000.00 fee which was charged the plaintiff was grossly excessive and entirely unreasonable.[152] Second, the defendant sanitarium through its employees did not confine its treatment solely to prayer as required by law, but as the evidence clearly showed they resorted to the use of physical agencies and means in their treatment of the plaintiff which is violative of the law.[153]

The other viewpoint was laid down in the case of Raisler v. Benjamin[154] which was decided in New York in

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151. 70 Fed. (2d) 389 (1933).
152. Kennedy v. Williams, 114 Vt. 54, 39 Atl. (2d) 193 (1944).
153. Ch. II, B, 1, (2).
154. 118 N. Y. S. 223.

1909. There the plaintiff had suffered for many years from an obscene disease which had produced a bad sore on his foot. The defendant, a Christian Science healer, told the plaintiff that his ailment could be cured with Christian Science treatment, and deterred the plaintiff from seeing a physician. Under the defendant's treatments which consisted of prayer, meditation and religious exhortation, the plaintiff's foot grew worse until it was too late to save it with medical care, and he was obliged to suffer amputation of the foot. The evidence was conflicting. The plaintiff, however, obtained a judgment of $6,000.00 against the defendant. Upon appeal the judgment was reversed as being excessive and also because improper evidence had been introduced at the trial. The ruling which appears to be enunciated in this case is that where a Christian Science practitioner makes deliberate and intentional false representations to induce a sick person to rely on Christian Science treatments, rather than on medical care, and the person is injured thereby, the latter has a cause of action against the practitioner. This rule is particularly applicable where the practitioner makes use of any physical means or agencies[155] or where the patient is suffering from an infectious or contagious disease[156] or where the patient is an infant.[157]

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155. The plaintiff suffered from stomach trouble. She went to the defendants, magnetic healers, at their institution for treatment. There she was placed on her back on a padded table, and her body was bent by the attendant until her knees almost touched her breast. Then the attendant turned her over on her stomach, and placed his right hand under her knees, and bent her legs up until she screamed with pain. These manipulations caused the plaintiff to be injured in her backbone, hipbone, spine and pelvic organs. The evidence also showed that the defendants also gave mental suggestive treatment. In affirming a judgment of $7,500.00 for the plaintiff, the Missouri court declared: "One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation. Failing in this, he must be held liable for any damages proximately caused by unskilled treatment of his patient. . . . The courts . . . look only to results. . . . The law holds him responsible if he does his work unskillfully, although he does the best he can. He takes the risk of the quality or accuracy of his genius or intuitions." Longan v. Weltmer et al, 180 Mo. 322, 79 S. W. 655 (1904).

156. Raisler v. Benjamin, supra. See also local public health statutes and ordinances.

157. Nelson v. Harrington, 72 Wis. 591, 40 N. W. 288 (1888). Dictum, Rex v. Brooks, 9 Brit. Col. 13, 1 B. R. C. 725 (1902); Lange v. Hoyt, 114 Conn. 590, 159 Atl. 575 (1932).

**b. Fraud.**—An action can be maintained against a Christian Science practitioner for fraud by relatives of the deceased patient who was defrauded by the practitioner. This is the holding of the case of Christian v. Canfield[158] which was decided in New Jersey in 1931. Here Miss Christian died at the age of sixty-seven, having been a confirmed invalid for over twenty-five years. For several years prior to her death, she relied exclusively upon Christian Science treatments which were given by the defendant, a Christian Science "healer." After Miss Christian's death, her relatives brought suit in equity to set aside two instruments made by Miss Christian which conveyed securities valued at $13,730.00 to the defendant as a gift upon the grounds that the instruments were secured by fraud and undue influence. The evidence showed that the defendant had charge of Miss Christian's financial affairs, and that the latter was under the influence of opiates at the time that the instruments were executed. In affirming a decree in favor of the relatives, the court declared: "At the outset we start with the presumption against the bona fides of the transaction because of the confidential and fiduciary relationship and the burden of showing the contrary is upon the beneficiary. That includes the burden of showing not only that the transfer was not procured by fraud or undue influence, but that the nature of the transaction was fully understood by Miss Christian, and that she had independent advice."

**c. Divorce.**—Surprising as it may seem, a married person may obtain a divorce upon the ground that his or her spouse is a Christian Science practitioner. Such a decision was rendered by the Supreme Court of New Hampshire in the case of Robinson v. Robinson.[159] In this case, the husband was a druggist. He and his wife were a very happy and loving couple until two years after their marriage when his wife became interested in Christian Science, and became a "Doctor" of Christian Science." Her practice of giving Christian Science treatments caused the husband to be ridiculed. As a result, his business suffered, his health became impaired, and he became morose and despondent. He begged his wife to

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158. 108 N. J. Eq. 547, 155 Atl. 788.
159. 66 N. H. 600, 23 Atl. 362 (1891).

give up her practice of Christian Science, and not her belief, but she refused. Thereupon, he brought suit for divorce upon the grounds of extreme cruelty. The court declared that the husband was entitled to a decree of divorce because the wife's conduct as a Christian Science "Doctor" came within the terms of the statute as such behavior on her part as to have the effect of endangering the health and reason of her husband.

However, a Christian Scientist cannot obtain a divorce merely because her spouse is in sharp disagreement with her belief in Christian Science. Thus in the case of Patterson v. Patterson,[160] the plaintiff is a strong believer in Christian Science. Her husband, the defendant, is a man without any settled religious belief, but of good mind and character. They have been married for twenty-five years, and have one son who is twenty years old and an epileptic. Due to the importunities of the plaintiff, the defendant permitted their son to be treated with Christian Science, but finding no good results coming from such treatments, he objected to their further continuance. Plaintiff insists that the Christian Science treatments be continued. The defendant has often severely criticized his wife's belief in Christian Science which has infuriated her. At the present time, the son is in a hospital. The plaintiff brought suit for divorce. Although the plaintiff and the defendant have stated that they never will live again together as husband and wife, an Ohio judge stated that such "strained relations are not a cause for divorce. . . . Under the peculiar circumstances of this case, . . . I shall give custody of the boy to the father." The award of the custody of the epileptic boy to the father was obviously decreed to assure that the boy would be provided with medical care rather than with Christian Science treatments.

**7. Custody of Infant Children.**—Where parents, who have infant children, are having their marital relations adjudged in a divorce court, and one of the parents is a Christian Scientist, the trial judge in determining which parent should have the custody of the children, would award the custody of the children to the parent who was not a Christian Scientist, because it would be for the best welfare of the children to receive medical

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160. 12 Ohio N.P. (N.S.) 601 (1912).

treatment when ill or injured rather than Christian Science treatments.[161] Another reason for such decision by the courts is that the probabilities are that a parent, who does not believe in the strict necessity of personal hygiene or in the existense of disease or in sanitary or quarantine measures because of a belief in Christian Science, will succumb to an infectious or contagious disease more readily than the average person, and in close contact with his or her children in such diseased condition would endanger seriously the health and even the lives of the children.

8. **Institutions of Christian Science.**—Early attempts to incorporate Christian Science institutions as religious corporations were unsuccessful. These institutions, incidentally, generally consisted of a church, a school for training practitioners, and a sanitarium where patients (sometimes called "guests"), who are supposed to be suffering from strong and persistent "illusions" of illness, injury or disease, are given Christian Science treatment, food and lodging. Such type of school charge their pupils tuition; while the sanitarium charges their patients for the expenses that arise in their treatment and care. In denying the incorporation of such Christian Science institutions as religious corporations in the early days, the courts have predicated their decisions upon the grounds that such institutions are against public policy in that they are a menace and danger to the public health, [162] that they are irreligious and founded solely for the pecuniary benefit of their founders or officers.[163] However, in more recent cases which have been decided in Illinois,[164] New Hampshire,[165] New York,[166] New Jer-

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161. Custody of child awarded to non-Christian Scientist spouse. Patterson v. Patterson, supra. Ch. II, B, 4, a. Heineman's Appeal, 96 Penn. 112, 42 Am. Rep. 532 (1880). "A review of the cases involving contests before the courts for the custody of minor children discloses that the health and physical condition of a child will often control the court in awarding its custody, the welfare of the child being the paramount consideration." 48 A. L. R. 137, 27 Am. Juris. 830.
162. First Church of Christ, Scientist, 205 Penn. 543, 55 Atl. 536 (1903).
163. Re St. Louis Institute of Christian Science, 27 Mo. A. 633 (1887).
164. Harges v. Zanders, 314 Ill. 170, 145 N. E. 363 (1924).
165. Glover v. Baker, 76 N. H. 393, 83 Atl. 916 (1912).
166. Re Winburn's Will, 247 N. Y. S. 584 (1931); Matter of Brush, 72 N. Y. S. 421 (1901); Re Briglin's Will, 203 N. Y. S. 646 (1924).

sey,[167] and Massachusetts,[168] incorporated and unincorporated institutions of Christian Science appear to be lawful, but in none of these later cases was the issue of the public health or the pecuniary interest of the founders of such institutions raised in the trial of these cases.

**9. Christian Scientists and Public Health.**—The case of State Ex. Rel. v. Probst[169] illustrates how Christian Scientists are restricted, insofar as the public health is concerned, in the practice of their beliefs. In this case, the plaintiff's daughter attended a public school in Minneapolis. She was sent home from school, because she was suffering from hoarseness and a sore throat. She was told that she would be permitted to return only upon furnishing the school authorities with a satisfactory health certificate from a physician or upon passing a physical examination to be given by the school physician. Plaintiff refused to do so because he was a Christian Scientist, and brought mandamus proceedings to secure his daughter's readmission to the school. In affirming the dismissal of the suit, the Supreme Court of Minnesota declared that "one of the primary duties of the (school) board is to protect the health of the many children in their charge. . . . Efforts for prevention do much to avoid an epidemic. The demand upon the (school) board for vigilance in this respect is imperative." The exclusion of the plaintiff's daughter from the school, the court further stated, was a valid and lawful exercise of the inherent police power of the school board. In substance, the holding in this case is that the proper public authorities can restrict Christian Scientists in the practice of their beliefs, if in any way they should tend to endanger the public health. The law laid down in this case is also applicable to Christian Scientists who are inmates of governmental institutions, such as old age homes or pauper homes or are inmates of prisons or insane asylums. This rule also applies to persons who are being inducted

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167. Previn v. Tenacres, Inc., 70 Fed. (2d) 389 (1933).

168. Dittemore v. Dickey, 249 Mass. 95, 144 N. E. 57 (1924); Attorney General v. Eustace, 240 Mass. 93, 132 N. E. 865 (1921); Eustace v. Dickey, 240 Mass. 55, 132 N. E. 852 (1921); Assessors of Boston v. Lamson, 316 Mass. 166, 55 N. E. (2d) 215 (1944); Chase v. Dickey, 212 Mass. 555, 99 N. E. 410 (1912).

169. 165 Minn. 361, 206 N. W. 642 (1925).

into or are serving in the Army or Navy.[170] In all such cases, Christian Scientists could and would be compelled, as a matter of public policy for preserving the public health, to submit to medical examination and treatment, and particularly so in times of war, flood, epidemic or great disaster.[171]

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170. Draftee refused to take the oath of induction unless the Army would waive its regulations on vaccination as to him. Such waiver was denied, and he was indicted for violation of the Federal Draft Law. His indictment was upheld. U. S. v. Anderson, 328 U. S. 699 (1946).

171. First Church of Christ, Scientist, supra; State Bd. of Medical Ex. v. Freenor, supra; Prince v. Massachusetts, 321 U. S. 158, 166-7 (1944).

## CHAPTER III

### III. Pacifism, Legal Aspects

#### A. Introduction

**1. Scope.**—This chapter concerns itself with the criminal and civil aspects of pacifism. The criminal aspects of pacifism cover such topics as the conflict of pacifism with national safety, the Federal Draft Acts of 1917 and 1940, and who is a "conscientious objector," "minister" and "divinity student" under such Acts. While the civil aspects deal with student pacifists, soldier pacifists, religious pacifist corporation, pacifists who are engaged in the practice of a licensed profession or trade or in public or private employment, and alien pacifists.

**2. Definitions**

**a. Pacifism.**—It is the belief with its consequence in practice that it is morally wrong or irreligious to participate in any form of military training and service in any branch of the armed forces whether in times of peace or war.

**b. Pacifist.**—One who disbelieves in and is against military training and service because it leads to injuring and destroying human life.

**3. History**

**a. England.**—"Upon the Norman Conquest the feudal law was introduced . . . (in England) in all its rigour, the whole of which is built on a military plan. . . . All the lands of the kingdom were divided into (over 60,000) knight's fees; . . . and for every knight's fee a knight or a soldier . . . was bound to attend the king in his wars, for forty days in a year. . . . By this means the king had, without any expense, an army of 60,000 men always ready at his command. . . . This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the restoration (of Charles II). Besides . . . military tenures . . . first the assize of arms, enacted . . . (in 1181) and afterwards the Statute of Winchester under Edward I, obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace; and constables

. . . were appointed to see that such arms were provided. . . . (These acts) were repealed in the reign of James I. While these continued in force . . . from time to time our princes (issued) . . . commissions of array, and sent to every county officer in whom they could confide, to muster, and array, or set up in military order, the inhabitants of every district. . . . But it was also provided that no man should be compelled to go out of the kingdom at any rate, nor out of his shire, but in cases of extreme necessity; nor should provide soldiers unless by consent of parliament. . . . The immediate cause of the fatal rupture between (Charles I) . . . and his parliament (was how far the power of the militia did inherently reside in the king); the two houses not only denying the prerogative of the crown . . . but also (illegally) seizing into their own hands the entire power of the militia. . . . Soon after the restoration of King Charles the Second, when the military tenures were abolished . . . the sole right of the crown to govern and command (the militia was recognized)."[1]

"In 1704, 1756, 1757 and 1779, acts were passed (in England) for recruiting of his Majesty's land forces and marines, directing a speedy and effectual levy of able-bodied men to serve as soldiers. The commissioners under these acts were required to levy and raise all able-bodied idle and disorderly persons who cannot, upon examination, prove themselves to exercise and industriously follow some lawful trade or employment, or to have some substance sufficient for their support and maintenance, to serve his Majesty as soldiers . . . (or) as common sailors. None were to be impressed under sixteen or above the age of fifty, or who had a vote in the election of members of Parliament. . . . If an able-bodied man had sufficient substance, however idle and disorderly he might be, he could not be impressed, and the evident objects of these acts was to force the poor man to serve at all events, and never to call compulsorily upon the nobility and gentry, and the middle classes of the kingdom."[2]

**b. United States.** — "In the (American) Colonies before the separation from England . . . the right to enforce military service was unquestioned and

1. Cooley's Blackstone (1899 Ed.) Vol. 1, Book 1, No. 409-13.
2. Kneedler et al v. Lane et al, 45 Penn. St. 238, 290 (1863).

. . . practical effect was given to the power in many cases. . . . And this exact situation existed after the separation (from England). Under the Articles of Confederation, . . . Congress had no such power, as its authority was absolutely limited to making calls upon the States for military forces needed to create and maintain the army, each State being bound for its quota as called. . . . The States in response to the calls made . . . met the situation when they deemed it necessary by directing enforced military service on the part of its citizens. . . . The duty of the citizens to render military service and the power to compel him against his consent to do so was expressly sanctioned by the constitutions of at least nine of the States. . . .

"When the Constitution (of the United States) came to be formed . . . it was manifestly intended . . . (that the power to raise an army be given all to Congress) and leave none to the States, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the States, without the consent of Congress, from keeping troops in times of peace or engaging in war. Article I, # 10.

(Under the militia clause, Article I, # 8, the State had the right to organize and train the militia, but the militia, was subject to the paramount authority of Congress which had the power to call) "forth the militia to execute the laws of the Union, suppress insurrections and repel invasions . . . and govern such part of them as may be employed in the service of the United States.

(Incidentally, from as early as 1777, Quakers[3] and other conscientious objectors have been exempted as an act of grace from military service by provisions of a number of state statutes and state constitutions, but "the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the Army with a substitute or with the money necessary to

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3. (Quakers believe that there is "that of God in every man," and recognize the principle of the "inner light" as the presence of God in every man, and for almost three hundred years have maintained that no Quaker is conscience-free to destroy another human life, no matter what the provocation.) See MacIntosh v. U. S., 42 Fed. (2d) 845, 847-8 (1930) for the exhaustive citations of such provisions.

hire one."[4] The early statutes of Massachussets[5] and Maine[6] expressly exempted Quakers who presented properly authenticated certificates of their being a Quaker from their local Quaker church.)

"From the act of the first session of Congress carrying over the Army of the Government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. . . .

"When the War of 1812 came, . . . a bill was introduced . . . to organize an army by compulsory draft (by which) . . . it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of eighteen and forty-five for service in the army. . . . Peace came before the bill was enacted.

(In the Mexican War, no draft was suggested, because the regular United States Army), "the militia and volunteer commands which were furnished proved adequate to carry the war to a successful conclusion.

(During the Civil War, first the militia was called, then an act authorizing the president to accept five hundred thousand volunteers, to be organized into a national army, then another act increasing the force of the militia.) "But it soon became manifest that more men were required. As a result the Act of March 3, 1863, c. 75, 12 Stat. 731 was adopted entitled 'An Act for enrolling and calling out the National Forces and for other purposes.' By that act . . . every male citizen between the ages of twenty-five and forty-five was made subject by the direct action of Congress to be called by compulsory

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4. Hamilton v. Regents, 293 U. S. 245, 266 (1934). In construing such a statute which exempts Quakers from bearing arms or from attending military musters, a Kentucky court held that under the statute they must pay an equivalent for personal services, the ascertainment and collection of which is to be made in accordance with the specific statutory provision. White v. M'Bride, 7 Ky. (Bibb) 61 (1815).
5. These certificates had to state that the petitioner was a member of the local Quaker Church, that he attended church frequently, conformed to its usages, had conscientious scruples against bearing arms, was signed by the proper church officials, and was presented within the proper time. Commonwealth v. Fletcher, 12 Mass. 441 (1815); Lees v. Childs, 17 Mass. 350 (1821).
6. Dole v. Allen, 4 Maine 527 (1827).

draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary . . . (Section 13 of this act provided that 'any person drafted . . . may . . . furnish an acceptable substitute to take his place in the draft or he may pay to such person as the Secretary of War may authorize to receive it, such sum not exceeding $300.00 as the Secretary may determine for the procuration of such substitute.' Although this act did not make express provision to exempt conscientious objectors for military service, it may have been thought that this previously mentioned section would take care of such persons.) . . . And under the power thus exerted four separate calls for draft were made by the president and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men. . . . It was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion."

(During the Civil War, the first Congress of the Confederate States of America in its second session, 1862, enacted the first national express exemption of religious pacifists from military service which specifically applied to "all persons who have been and now are members of the Society of Friends and the association of Dunkards, Nazarenes and Mennonists, in regular membership in their respective denominations: Provided, members of the Society of Friends, Nazarenes, Mennonists and Dunkards shall furnish substitutes or pay a tax of $500.00 each into the public treasury."[7] As can be seen from this provision, this exemption was not absolute. It was limited to members of certain named sects, and the exemption was only granted upon the furnishing of a substitute or paying a tax. This exemptionary provision of the act was interpreted by an Alabama Court in 1863 in the case of Ex Parte Stringer.[8] In this case, the petitioner for a writ of habeas corpus was in custody of an Alabama military instruction camp. He claimed that he was a member of a "Christian Church," and had conscientious scruples

7. Matthews Statutes at Large of the Confederate States of America (1st Congress, 2d Session, 1862) p. 77, 78.
8. 38 Ala. 457 (1863).

against bearing arms, and therefore was exempt from military service under the Alabama Constitution which expressly exempted from military service such persons "who shall pay an equivalent for personal service," and he claimed such right. In denying the writ, the Alabama court declared that the "power of the Confederate government to conscribe the citizen is derived from the Federal Constitution, and is not at all dependent on the Constitution of the State of Alabama. . . . Conscientious scruples, against bearing arms, unless the party entertaining them belongs to one of the religious sects mentioned in the statute, presents to the courts no legal grounds for declaring the petitioner exempt from military duty." Here, the petitioner failed to prove that he was a member of any such specifically exempted religious sect.)

. . . "The organized body of the militia within the States as trained by the States under the direction of Congress became known as the National Guard. (Act of Jan. 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 3, 1916, c. 134, 39 Stat. 211.) And to make further preparation from among the great body of citizens, an additional number to be determined by the President was directed to be organized and trained by the States as the National Guard Reserve (National Defense Act, supra)."[9] This 1903 Act provided that no person whose religious convictions are against war or participation therein shall be compelled to serve in the militia or other armed force. Chap. 196, # 2. Later in 1916 the Federal statute provided that "all persons who because of religious belief shall claim exemption from military service . . . shall be exempted from militia service in a combatant capacity." Ch. 134, # 58 and 59, 39 Stat. 197.

4. **Conflict with National Safety.**—In the past and particularly during times of war, the courts have viewed pacifists with strong disfavor[10] not only because they are unwilling to bear arms, but also because they are "disposed to encourage others in such refusal . . .

9. Selective Draft Law Cases, 245 U. S. 366, 379-387 (1918).
10. U. S. v. Pruth, 251 Fed. 946 (1918), Doe v. U. S. 253 Fed. 903 (1918); Debs v. U. S., 249 U. S. 211 (1918); U. S. v. Binder, 253 Fed. 978 (1918); Schenk v. U. S., 249 U. S. 47 (1919); Fraina v. U. S., 255 Fed. 28 (1918); Goldman v. U. S., 245 U. S. 474 (1918).

and . . . (are) without any sense of nationalism. . . . (and are) . . . not well bound or held by ties of affection to any nation or government. Such persons are liable to be incapable of the attachment for and the devotion to the principles of our Constitution. . . . It is shown by official records and everywhere well known that during . . . (World War I) there were found among those who described themselves as pacifists and conscientious objectors many citizens—though happily a minute part of all—who were unwilling to bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. Local (draft) boards found it necessary to issue a great number of noncombatant certificates, and several thousand who were called to camp made claim because of conscience for exemption from any form of military service. Several hundred were convicted and sentenced to imprisonment for offenses involving disobedience, desertion, propaganda and sedition."[11]

An illuminating illustration of the conflict of pacifism with national safety is the recently decided case of Baxley v. U. S.[12] There the defendant was indicted for counselling certain persons to avoid service in the armed forces. The evidence showed that the defendant had stated publicly that he had advised his son not to fight or wear the uniform, that Germany was sure to win the war, and that he preferred to live under Hitler in this country. In defense, the defendant, a Jehovah's Witnesses, claimed that he was engaged in teaching and preaching the cardinal tenets of his sect, and fulfilling the mission imposed upon him by God. In upholding his conviction, the federal court declared that "one is criminally responsible who does an act which is prohibited by a valid criminal statute, though the one who does this act may do so under a deep and sincere religious belief that the doing of the act was not only his right but also his duty. . . . This seems to be one of those situations in which an attempt to employ religion as a sword prevents its use as a shield. (The defendant counselled others to evade service in the armed forces of the United States;) he thereby violated the Selective Service Act, and (therefore) the First Amendment affords him no protection."

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11. U. S. v. Schwimmer, 279 U. S. 644, 652 (1929). Ibid.
12. 134 Fed. (2d) 937 (1943).

**5. No Federal Constitutional Exemption.**— "From the beginnings of our history, Quakers and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the Army with a substitute or with the money necessary to hire one. . . . For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending . . . (war as a means of avoiding personal military service than the actual participation in the service itself.) . . . Never in our history has the notion been accepted, or even . . . advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt in law or in morals from regulation by the state (or nation).[13] The pacifist "is relieved from the obligation to bear arms in obedience to no (Federal) constitutional provision, express or implied; but because, and only because, it has accorded with the policy of (the) Congress (of the United States) thus to relieve him. . . . The privilege of the native-born . . . (pacifist) to avoid bearing arms comes not from the (Federal) Constitution, but from Acts of Congress. That body may grant or withhold the exemption as in its wisdom, it sees fit; and if it be withheld, the native-born . . . (pacifist) cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers* . . .

13. Hamilton v. Regents of University of California, 293 U. S. 245, 266-7 (1934).

*"From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the (Federal) Constitution or in applicable principles of international law. . . . This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life. To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." U. S. v. MacIntosh, 283 U. S. 605, 622 (1931).

which include, by necessary implication, the power in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. . . . (A citizen) may be compelled, by force if need be, against his will and without regard to his personal wishes . . . or his religious or political convictions, to take his place in the ranks of the Army of his country and risk the chance of being shot down in its defense."[14] If the law were otherwise, the pacifist "might (even) refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never been so exalted above the powers and compulsion of the agencies of the government."[15] In short, it may be stated that there never has been in American history any Federal constitutional provision which exempted pacifists or even clergymen from compulsory military service; such exemption, when granted, is strictly an act of grace, and has been by a specific act of the Congress of the United States.[16]

**B. Criminal Aspects.**—The criminal aspects of pacifism deals with the criminal prosecution of pacifists for violations of the Federal Draft Acts of 1917 and 1940.

**1. World War I (Federal Draft Act of 1917)**

**a. Exemptions.**

**(1) In general.**—The 1917 Federal Draft Act provides that "regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools . . . shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well recognized

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14. Ibid, 623-4.
15. Hamilton v. Regents of University of California, 293 U. S. 245, 268 (1934).
16. "The (Federal) Constitution grants no immunity from military service because of religious convictions or activities. Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and Holy Calling." Rase v. U. S., 129 Fed. (2d) 204, 210 (1942). The Federal Draft Laws of 1917 and 1940 grant such specific exemption.

religious sect or organization at present organized and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organization."[17]

(2) **Substitutes prohibited.**—The previous practice of obtaining military exemption by furnishing a substitute or by payment of money necessary to hire one was abolished by the 1917 Federal Draft Act.[18]

(3) **Constitutional Aspects.**—The constitutionality of the Federal Draft Act of 1917 was upheld in the publicized Selective Draft Law Cases,[19] despite the fact that the Act exempts ministers and theological students, and relieves from military service members of certain religious sects whose tenets deny the moral right to engage in war. This case was decided by the Supreme Court of the United States in 1918. The facts briefly were as follows: The Federal Draft Act of 1917 required that all men between the ages of twenty-one and thirty to comply with the provisions of the Act. The defendants failed to do so and they were all prosecuted for violations of the Act. One of the main defenses was that it was unconstitutional for Congress to compel military service by a selective draft because the Act violated the constitutional guaranty of religious freedom. In upholding the constitutionality of the Act, and affirming the convictions of the defendants, the Supreme Court averred: "The very conception of a just government and its duties to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." This ruling is based upon a fundamental principle of the Constitution that it is the "duty of citizens by force of arms to defend our government against all enemies whenever necessity arises. . . . The common defense was one of the purposes for which the people ordained and established the Constitution."[20]

(4) **Who is a "Minister" under the Act.**—The only reported case in point is Ex Parte Short.[21] Here Short was a Unitarian minister for two years.

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17. 40 U. S. Stat. 76, Act of May 12, 1917, c. 15, # 4.
18. Ibid, No. 3.
19. 245 U. S. 366.
20. U. S. v. Schwimmer, 279 U. S. 644, 650 (1929).
21. 253 Fed. 839 (1918).

Then he resigned from his church, and for the past five months had devoted all his time to the People's Council, an alleged unpatriotic organization, in an executive capacity. The court upheld the induction of Short into the Army upon the ground that he was not a minister because he was not engaged in the teaching and preaching the principles of his church.

**(5) Who is a "Conscientious Objector" under the Act.**—One is a conscientious objector only if he is a member of a well established religious sect.[22] Thus if one is not a member of such well established sect, he is not a conscientious objector under the Act, even though his pacifism arises from his personal conscientious and religious beliefs.

**2. World War II (Federal Draft Act of 1940)**

**a. Who is a "Conscientious Objector" under the Act.**—The 1940 Act specifically exempts any person "who, by reason of their religious training and belief is conscientiously opposed to participation in war in any form," and gives the conscientious objector the choice of becoming a member of the armed forces in non-combatant service or doing work of national importance under civilian direction in a public service camp.[23] Incidentally, "the draft of conscientious objectors for civilian work was primarily to assist in the functioning of the military draft by removing a possible haven for draft evaders and by protecting the morale of the military draftee; secondarily, it was to provide against interruption of work of national importance by the movement of the best of our manpower into military service."[24] A conscientious objector is one who because of a "compelling voice of conscience"—a religious impulse—has a general scruple against participation in all wars in any form. Therefore, a person who objects to a specific war on rational, humanitarian, social, economic, moral, philosophical or political grounds cannot be classified as a conscientious objector.[25] This rule was enunciated in the leading case

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22. 40 U. S. Stat. 76, Act of May 18, 1917, c. 15, No. 4.
23. 54 U. S. Stat. 885, No. 5 (g).
24. U. S. v. Steinel, 70 Fed. S. 966, 968 (1946).
25. Neither "a sincere devotion to a high moralistic philosophy" or "philosophical views and good deeds and deep beliefs in social action" make one a conscientious objector under the Act. Berman v. U. S., 156 Fed. (2d) 377 (1946). Claim also denied in Bowles v. U. S., 319 U. S. 33 (1943); Lancaster v. U. S., 153 Fed. (2d) 718 (1946); Saunders v. U. S., 154 Fed. (2d)

of U. S. v. Kauten.[26] In this case, the defendant, an artist, is an athiest. He has an intense dislike towards President Roosevelt and his foreign policies, and has publicly stated that the Selective Service Act of 1940 is a scheme which was devised by President Roosevelt to solve the unemployment problem. He is a believer in Ghandi's policy of passive resistance, and has stated that France did the right thing in submitting to Germany, and that our trouble with Japan arose from our unfriendliness to that country. An FBI report indicated that the defendant is an honest and sincere citizen. In denying the defendant's claim for exemption as a conscientious objector, the scholarly Federal Judge Hand pointed out that in "order to avail himself of his privilege, a registrant must establish that his objection to participation in war is due to 'religious training and belief.' It must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war. Moreover, the conviction that war is a futile means of righting wrongs or of protecting the state, that it is not worth the sacrifice, that it is waged for base ends, or is otherwise indefensible is not necessarily a ground of opposition based upon 'religious training and belief'. Though the registrant may have been entirely sincere in the ideas he expressed, his objections to reporting for induction were based upon philosophical and political consideration applicable to this war rather than on 'religious training and belief.' They, therefore, were properly overruled, but not because he lacked membership of any sect or organization whose religious convictions were against war. Such a status was necessary to obtain exemption under the Act of 1917, but the provisions of the present statute are more generous for they take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. . . . The registrant did not report for induction because of a compelling voice of conscience, which we should regard as a religious impulse, but his declarations and reasoning seem to indicate that he was

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872 (1946); Pacman v. U. S., 144 Fed. (2d) 562 (1944). Claim allowed. U. S. v. Badt, 152 Fed. (2d) 627 (1945).

26. 133 Fed. (2d) 703 (1943).

moved by convictions, however sincere, of quite a different character.

"In the early days of the draft, many thousands of American people distrusted our foreign policy. If men holding such views had been ipso facto classed as conscientious objectors, the military effort might well have been seriously hampered. In granting such exemption, we think Congress intended to satisfy the consciences of the very limited class we have described and not give exemption to the great number of persons who might object to a particular war on philosophical and political grounds.

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of inadequacy of reason as a means of relating the individual to his fellow-man and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Wittenberg and, when he was summoned before Emperor Charles and the Diet of Worms, steadfastly to hold his ground and to utter the often quoted words: 'I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen.' Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: 'Conscience is a God to all mortals'; impelled Socrates to obey the voice of his 'Daimon,' and led Wordsworth to characterize 'Duty' as the 'Stern Daughter of the Voice of God.'

"There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The

latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

A draftee to be classified as a conscientious objector must remain steadfast to his pacifistic belief, and if he by any single overt act deviates or does anything inconsistent with such belief, he may demonstrate a lack of serious devotion to his belief, and thus deprive himself of such classification.[27] This rule is well illustrated by the case of U. S. v. Downer.[28] The defendant was the son of a conscientious objector of World War I who had been confined to prison, sentenced to death which sentence was later commuted by President Wilson. The defendant is not a member of any religious sect although he is a member of the War Resisters' League. He does not believe in God, but does believe that war is morally wrong. He entertains a love for his fellowmen and an abhorence at inflicting injury upon human beings. An FBI report showed that the defendant had taken and failed in an eye examination, preliminary to enlistment in the Air Corps. The court rightfully held that the defendant was not entitled to classification as a conscientious objector.

Conscientious objectors who refuse or fail to register at their local draft board or report for induction to a civilian public service camp[29] or who refuse to perform any work there[30] or who have wrongfully deserted from

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27. U. S. v. Downer, 139 Fed. (2d) 761 (1944).
28. Ibid.
29. U. S. v. Kirschennman, 65 Fed. S. 153 (1946); Heflin v. Sandford, 142 Fed. (2d) 798 (1944); U. S. v. Brooks, 54 Fed. S. 995 (1944); U. S. v. Osborne, 54 Fed. S. 984 (1944); U. S. v. Fraterick, 140 Fed. (2d) 5 (1944); U. S. v. Gormly, 136 Fed. (2d) 227 (1943); Edwards v. U. S., 145 Fed. (2d) 678 (1944); U. S. v. Van Den Berg, 139 Fed. (2d) 654 (1944); Hopper v. U. S., 142 Fed. (2d) 181 (1944); Crutchfield v. U. S., 142 Fed. (2d) 170 (1943); U. S. v. Madole, 145 Fed. (2d) 466 (1944); U. S. v. Goodwin, 95 Fed. S. 510 (1943).
30. Weightman v. U. S., 142 Fed. (2d) 188 (1944); Rodenko v. U. S., 147 Fed. (2d) 752 (1945); Bell v. Haynes, 63 Fed. S. 540 (1945).

such camp[31] or who have refused to report for induction into the service as a non-combatant[32] have been convicted and sentenced as offenders under the Federal Draft Act.

**b. Who is a "Minister" under the Act.—** Under the 1940 Federal Draft Act, "regular or duly ordained ministers of religion . . . shall be exempt from (military) training and service (but not from registration) under this Act.[33] Because ministers are granted complete exemption by the Act, a large number of cases have arisen as to who is a minister under the Act.

In the leading case of Buttecali v. U. S.,[34] the defendant made claim for exemption as an ordained minister. His evidence consisted of a card from the Watch-Tower Bible and Tract Society which attested that he was an ordained minister of Jehovah's Witnesses.[35] The ordination, itself, consisted of the defendant's avowal of belief in the doctrines of the Society, and the issuance of the certificate by its President. For the preceding three years, the defendant spent a few hours each year distributing religious magazines of the Society that cost him 20c per copy and which he sold

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31. U. S. v. Hutchinson, 55 Fed. S. 648 (1944); Wolfe v. U. S., 149 Fed. (2d) 391 (1945); Gibson v. U. S., 149 Fed. (2d) 751 (1945); Dengman v. U. S., 156 Fed. (2nd) 148 (1946). In Kramer v. U. S., 147 Fed. (2d) 756 (1945), a Federal court declared that "it is long past high-time that able-bodied young male citizens of the United States, who claim that their religious convictions prevent their taking up arms in the defense of the Nation which guarantees them their religious freedom, should learn that they cannot flaunt to the extent of disobedience of law their exemption from military service, accorded because of their peculiar beliefs, which if held by more than a modicum of American manhood, would result in the destruction of our country and the enslavement of our people."
32. Shaddy v. U. S., 139 Fed. (2d) 754 (1944); U. S. v. Steinel, 70 Fed. S. 966 (1946).
33. Act Sept. 16, 1940, 54 U. S. Stat. 885, No. 5 (d).
34. 130 Fed. (2d) 172 (1942).
35. "The (Jehovah's) Witnesses are an ultra and uncompromising religious sect whose members profess allegiance to a visionary heavenly kingdom and disclaim all duties of citizenship which they deem in conflict with such heavenly allegiance. . . . In short, they are religious zealots, possessing in ample measure the qualities which have ever characterized those who devote themselves wholly to theological abstractions to the exclusion of all regard for the practical affairs and duties of citizenship" . . . (particularly to bear arms in the defense of their country, if required to do so). U. S. v. McGinnis, 56 Fed. S. 668 (1944). "I am unable to reconcile the Jehovah's Witnesses' abhorence for human institutions with the alacrity with which they rush into the protecting arms of our courts whenever they become involved in controversy with our civil or military authorities." Judge Schwellenbach, U. S. v. Hillyard, 52 Fed. S. 612, 613 (1943).

for 25c, and once playing some of the phonograph records of the Society. He never preached to a congregation, and the other carpenters, with whom he was regularly associated in his daily work as a carpenter, were all unaware that he was a minister. The defendant's claim for exemption as a minister was rejected, and he was convicted for violation of the Draft Act. In affirming his conviction, the federal court stated that "a duly ordained minister, in general acceptation, is one who has followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching that religion through an ordination ceremony under the auspices of an established church, has been commissioned by that church as its minister in the service of God, and generally is subject to control or discipline by a council of the church by which he was ordained. These ministers, and not those consecrated laymen happily found in the membership of every church who live and serve well, are exempt by the statute; and the object of Congress in the enactment of the statute is not to be thwarted because a religious society chooses to designate its ordinary members as ordained ministers."

In a similar case, Rase v. U. S.,[36] the evidence in support of the defendant's contention that he was a minister of Jehovah's Witnesses consisted of a card from its Society to that effect with Judge Rutherford's printed signature, his preaching by means of the distribution of printed books, magazines, playing phonograph records of the Society's lectures, and oral presentation of Jehovah's Kingdom's message from door to door, and conducting Bible classes in private homes. The evidence also showed that for the past three years that he had been employed as a gas station attendant, and later as a stock-keeper for a jewelry concern at a weekly salary. The conviction of the defendant for failure to report to a civilian public service camp was upheld in these words: "If we understand the appellant's argument, every member of his sect is a minister of religion and so entitled to exemption. No differentiation is to be recognized between . . . pastor and congregants. Followed to its logical conclusion, this would mean that all members of any religious group which imposes upon

36. 129 Fed. (2d) 204 (1942).

its adherents an obligation to teach and preach its beliefs or to make converts, are exempted under the Selective Service Act without regard to whether such activity constitutes their sole or principle vocation. It is inconceivable that it was the intention of Congress to incorporate in the Act an exemption so broad and all-embracing. . . . No question of religious liberty . . . is here involved, and the zealous and ill-advised pursuit of a martyr role is not, by the sanction of the Constitution, permitted to imperil national safety, without the preservation of which, liberty of conscience and religion will everywhere disappear."

In another like case,[37] the defense stressed the right of freedom to preach without restriction. The defendant was a Pioneer, a full time preacher, in the Jehovah's Witnesses. He claimed that his position required him to devote all his time to preaching and teaching its tenets. Defendant is just twenty-one and his principal witness is nineteen. The local draft board gave him a 1A classification which the court affirmed in the following words: "If these young men having a zeal for the Christian religion, which they claim to preach, and for the preservation of our constitutional form of government and their freedom to worship according to the dictates of their own consciences, would give more heed to the necessities of the present conflict and less heed to the necessity for them to solicit new members to their sect and preach the gospel, they would be rendering a service not only to their nation in its dire needs, but to their own religion."

A condensation of the rulings in the Buttecali, Rase and Meredith cases reveals the law to be that one cannot be classified as a minister under the Federal Draft Act where the facts show that he is in reality nothing more than a member of a religious congregation, that he has

37. Meredith v. Carter, 49 Fed. S. 899 (1943). In Drumheller v. Berks C. L. Bd., 130 Fed. (2d) 610 (1942), the appellant is a Pioneer in the Jehovah's Witnesses. He claimed to be an ordained minister. He had been classified as a conscientious objector by the draft board, and had been ordered to report to a civilian public service camp. He asserted that it would be a violation of his conscience to go to such a camp, that he felt he must be free to preach, and that he could not impair his function as a preacher by submission to any authority than that of God. He filed a petition to enjoin the board from sending him to such a camp. His petition was denied by the court which stated that as to appellant's belief, we do not question his sincerity, "but he is none the less subject to all the laws of the United States which govern other men in their duty to their country."

substantial or full time employment in a purely secular occupation[38] for some time prior to filing his draft questionnaire, and that his ministerial activities constitute only a minor part of his actual work.[39] In accord with this statement of the law, the courts (in upholding the decisions of the local draft boards) have denied classification as ministers to farmers,[40] carpenters,[41] a gas station attendant,[42] factory workers,[43] laborers,[44] a taxicab driver,[45] a bank clerk,[46] a stock clerk,[47] a freight traffic management clerk,[48] conscientious objectors,[49] a Christian Scientist,[50] who was also a part time lawyer and business man, a young rabbi,[51] who was also a full time practicing lawyer, a Mormon Counsellor,[52] Jehovah's

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38. Checinski v. U. S., 128 Fed. (2d) 461 (1942).
39. Buttecali v. U. S., supra.
40. Bullard v. Major C. L. Bd., 50 Fed. S. 192 (1943); Ex Parte Yost, 55 Fed. S. 768 (1944); Wells v. U. S., 158 Fed. (2nd) 932 (1947); Bromemann v. U. S., 138 Fed. (2d) 333 (1943).
41. Baxley v. U. S., 134 Fed. (2d) 998 (1943); Buttecali v. U. S., supra.
42. Rase v. U. S., supra.
43. Honaker v. U. S., 135 Fed. (2d) 613 (1943); U. S. v. Mroz, 136 Fed. (2d) 221 (1943).
44. U.S. v. Domres, 142 Fed. (2d) 477 (1944); Ex Parte Robert, 49 Fed. S. 131 (1943).
45. U. S. v. Pitt, 144 Fed. (2d) 169 (1944).
46. Seele v. U. S., 133 Fed. (2d) 1015 (1943).
47. Cahoon v. U. S., 155 Fed. (2d) 150 (1946).
48. Ex Parte Stewart, 47 Fed. S. 415 (1942); Clerk, U. S. v. Balogh, 157 Fed. (2d) 939 (1946).
49. U. S. v. Newman, 44 Fed. S. 817 (1942); U. S. v. Pace, 46 Fed. S. 316 (1942); U. S. v. Kowal, 45 Fed. S. 301 (1942); U. S. v. Welden, 56 Fed. S. 777 (1944); Haberman v. U. S. 131 Fed. (2d) 1018 (1942).
50. In Re Rogers, 47 Fed. S. 265 (1942), the petitioner is a lawyer and businessman, 44 years of age, and maintains an office in Tulsa. He is the owner of several farms, oil and gas properties, and other interests, which are worth approximately $300,000.00, to which he devotes most of his time. From 1929 to 1932, he was a reader in a Christian Science Church in Tulsa. From 1932 to the present time, he considered himself as a substitute reader which he failed to prove. During the past several summers, he has gone to Boston to study further the teaching of his church. He has talked to some persons, and has sought to benefit them through the Christian Science religion. He was unable to name the amount, or approximate the same, that he has earned from rendering such healing. The petitioner was held not to be a "minister" under the Act.
51. U. S. (Trainin) v. Cain, 144 Fed. (2d) 944 (1944).
52. Harris v. Ross, 146 Fed. (2d) 355 (1944).
53. U. S. v. Di Lorenzo, 45 Fed. S. 590 (1942); U. S. v. Geime, 128 Fed. (2d) 811 (1942); Cox v. U. S., 332 U. S. 442 (1947); Fletcher v. U. S., 129 Fed. (2d) 262 (1942). U. S. v. Rinko 147 Fed. (2d) 1 (1945); Ex Parte Kelley, 48 Fed. S. 816 (1943); Swaczyk v. U. S., 156 Fed. (2d) 17 (1946). Crutchfield v. U. S., 142 Fed. (2d) 170 (1943); Mayborn v. Heflebower, 145 Fed. (2d) 864 (1945); Sirski v. U. S., 145 Fed. (2d) 749 (1944); Rea v. McDonald, 153 Fed. (2d) 190 (1946); U. S. v.

Witnesses,[53] a hospital attendant,[54] a soldier,[55] a draftsman,[56] a professional model posing in the United States Army uniform, [57] a treasurer of a furniture company,[58] college engineering student,[59] paint filler,[60] cattle raiser,[61] stenographer,[62] liquor store clerk,[63] coal miner,[64] and a truck driver and grocery store operator.[65] The law is the same even though the person, who claims he is a minister, suddenly gives up all secular employment, and overnight devotes all of his time to preaching and conducts himself in the activity usually associated with that of a minister;[66] in other words, merely calling oneself a minister, and doing pastoral work exclusively, will not of itself make one a minister under the Act.[67]

The previously mentioned Buttecali case points out that in order to be a minister under the Act, the law requires four theological qualifications: First, that the claimant has followed a prescribed course of study of religious principles. Second, that he has been consecrated through an ordination ceremony under the auspices of an established church. Third, has been commissioned by that church as one of its ministers. Fourth, is subject to the discipline of the council of his church. In all of the cases under consideration in which claim was made for exemption as a minister under the Act, one or more of these

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Stalter, 151 Fed. (2d) 633 (1945); U. S. v. Ryals, 56 Fed. S. 773 (1945); U. S. v. Garvin, 71 Fed. S. 545 (1947); U. S. v. Dailey, 139 Fed. (2d) 7 (1944); Shaddy v. U. S., 139 Fed. (2d) 754 (1944); Hopper v. U. S., 142 Fed. (2d) 181 (1944). U. S. v. McGinnis, 146 Fed. (2d) 851 (1944). Lemien v. U. S. 158 Fed. (2d) 550 (1947); U. S. v. Stiles 72 Fed. S. 538 (1947); U. S. v. Kirschenman, 65 Fed. S. 153 (1946); U. S. v. Kennedy, 66 Fed. S. 183 (1946); U. S. v. Zieber, 161 Fed. (2d) 90 (1947); English cases in accord. Emery & others v. Sage, 1 All Eng. R. Antd. (1943) 509. Saltmarch v. Adair, (1941-1942) Ct. of S. C. 58 (1942). Canadian case. Rex v. Stewart, 60 Brit. Col. 296, 81 Can Cr. C. 349 (1944).

54. U. S. v. Messersmith, 138 Fed. (2d) 599 (1943).
55. McCord v. Page, 124 Fed. (2d) 68 (1941).
56. Swazyk v. U. S., 156 Fed. (2d) 17 (1946).
57. U. S. v. Kennedy, 66 Fed. S. 183 (1946), affd. 157 Fed. (2d) 811 (1947).
58. Klopp v. Overlade, 66 Fed. S. 450 (1946).
59. Smith v. U. S., 157 Fed. (2d) 176 (1946).
60. U. S. v. Zeiber, 161 Fed. (2d) 90 (1947).
61. Hopper v. U. S., 142 Fed. (2d) 181 (1944).
62. U. S. v. Salter, 151 Fed. (2d) 633 (1945).
63. Harris v. Ross, 58 Fed. S. 299 (1944), affd. 146 Fed. (2d) 355.
64. Goodwin v. Rowe, 49 Fed. S. 703 (1943).
65. Cox v. U. S., 332 U. S. 442 (1947).
66. The first time that the defendant claimed to be a full fledged minister was after war was declared, and he had been called to the draft. U. S. v. Mroz, 136 Fed. (2d) 221 (1943).
67. Ibid.

four qualifications were missing in each particular case, and therefore the rejection of such claims by the courts was justified in every case.[68]

**c. Who Is a "Divinity Student" under the Act.**—The Federal Draft Act of 1940 declares that "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of the enactment of this Act, shall be exempt from training and service (but not from registration) under the Act."[69] In determining who is a "divinity student" under the Act, particularly in questionable or borderline cases, the local draft boards and courts have considered the age, background, demeanor, and the surrounding facts which pertain to each student.

At the outset, it may be stated that mere attendance at a theological school does not make one ipso facto a divinity student under the Act.[70] In several New York cases,[71] young orthodox Jewish Talmudic Academy students were held not divinity students, because such academies are not strictly such theological schools as are recognized by the Act, and also because they were not students with serious spiritual convictions, and further because their current religious studies were prompted by extraneous considerations—a desire solely to secure military exemption. In all such cases, the burden of proof is on the student to prove in fact that he is a divinity student under the Act.[72] Thus in one case, a student who attended an orthodox Jewish seminary in the morning, and in the afternoon went to New York University where he majored in physical education, was held not to be a theological student, because all of his studies were not devoted to theology.[73] In another case,[74] a clerk in a textile company had quit his job to return as a day student at the Mesifta Theological Seminary to prepare for the rabbinate "in the month when his selec-

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68. Ch. III, B, 2, b.
69. Act Sept. 16, 1940, 54 U. S. Stat. 885, No. 5 (d).
70. U. S. (Steinberg) v. Graham, 57 Fed. S. 938 (1944).
71. U.S. (Yaroslawitz) v. Fales, 61 Fed. S. 960 (1945); U. S. (Goodstein) v. Mallon, 61 Fed. S. 671 (1945); U. S. (Goodman) v. Hearn, 153 Fed. (2d) 186 (1946); U. S. (Isseroff) v. Cain, 57 Fed. S. 715 (1944).
72. Held to be "divinity students." U. S. (Rubin) v. Magruder, 55 Fed. S. 947 (1944); U. S. (Levy) v. Cain, 149 Fed. (2d) 338 (1945).
73. U. S. (Steinberg) v. Graham, 57 Fed. S. 938 (1944).
74. Eagles v. Samuels, 329 U. S. 304 (1946).

tive service questionnaire was returned, and the fact that the seminary in question was apparently not preparing men exclusively for the rabbinate make questionable," the court declared, "his claim that he was preparing in good faith for the rabbinate. A registrant might seek a theological school as a refuge for the duration of the war. . . . There was some evidence that this was . . . (the registrant's) plan." In a similar case,[75] a draftee in his draft questionnaire stated that he was a college student preparing for a career as a psychiatric social worker; later, after he had been physically examined and found qualified for military service, he advised the local draft board that he had enrolled in the Rabbinical Seminary of America. His 1A draft classification was upheld.

In determining whether a registrant should be classified as a divinity student, local draft boards may use the assistance of an advisory panel on theological qualifications.[76]

**d. Judicial Review of Draft Classification.**—In order for a registrant to obtain judicial review of his draft classification for statutory exemption as a "conscientious objector" or "minister" or "divinity student," he must first exhaust all of his administrative remedies under the Federal Draft Act, and only then in a subsequent criminal prosecution for failure to comply with the order of the local draft board in violation of the Act, will he be permitted to interpose the defense that he was wrongfully classified by the local draft board by showing that his classification was not determined in conformity with selective service regulations or that there was no basis in fact for the decision of the draft board in making such classification upon the grounds that it was arbitrary or capricious or discriminatory.[77] Generally, however, in order to exhaust his administrative remedies, a registrant, who has been classified as 1A, would have to report to the specified induction center of the armed forces concerned,[78] but not submit to induc-

75. Eagles v. Horowitz, 329 U. S. 317 (1946).
76. Ibid.
77. U. S. v. Falbo, 320 U. S. 549 (1944); Estep v. U. S., 327 U. S. 114 (1946); Saunders v. U. S., 154 Fed. (2d) 872 (1946); Sunal v. Large, 332 U. S. 174 (1947); Cox v. U. S., 332 U. S. 442 (1947).
78. U. S. v. Balogh, 160 Fed. (2d) 999 (1947); Thompson v. U. S., 161 Fed. (2d) 761 (1947); U. S. v. Alexander, 164 Fed. (2d) 139 (1947).

tion;[79] whereas, a registrant, whose classification is that of a "conscientious objector," would exhaust his administrative remedies by merely submitting to the pre-induction physical examination, and it is unnecessary for him to report to the civilian public service camp.[80] Another means of judicial review of the draft classification of a registrant is by the prompt[81] institution of habeas corpus proceedings after induction into the armed forces.[82] A registrant cannot secure judicial review of his draft classification by such collateral legal proceedings as mandamus,[83] injunction[84] or declaratory judgment proceedings.[85]

**e. Defenses to Criminal Prosecutions.**—Various defenses have been raised by purported conscientious objectors, ministers and divinity students in the course of their trials for criminal violations of the 1940 Federal Draft Act, such as double jeopardy, vested classification, involuntary servitude, trial by jury, forced labor without compensation, and constitutional religious freedom.

**(1) Double jeopardy.**—In U. S. v. Hrabcak,[86] the defendant had been classified as a conscientious objector. He was convicted and sentenced for his failure to report to a civilian public service camp. After his discharge from prison, he was again classified as a conscientious objector by his local draft board, and ordered again to report to such a camp which he refused to do. He was again indicted. His defense was a plea of double jeopardy. In affirming the defendant's conviction, the court declared that he "has a continuing duty to serve his country in time of war and when he is legally called upon to do so he must respond. . . . This duty (is) . . . similar to the obligation of a father to support his chil-

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79. Refused to take the oath. Lawrence v. Yost, 157 Fed. (2d) 44 (1946). In re Herman, 56 Fed. S. 733 (1944); Billings v. Truesdell, 321 U. S. 542 (1944).
80. Gibson v. U. S., 329 U. S. 338 (1946); Poole v. U. S., 159 Fed. (2d) 312 (1947).
81. Ch. III, C, 2, footnote No. 4.
82. Estep v. U. S., 327 U. S. 114, 123-5 (1946).
83. U. S. v. Mancuso, 139 Fed. (2d) 90 (1943); Dick v. Tevlin, 37 Fed. S. 836 (1941).
84. Drumheller v. Berks C. L. Bd., 130 Fed. (2d) 610 (1942); Bullard v. Major C. L. Bd., 50 Fed. S. 192 (1943).
85. Meredith v. Carter, 49 Fed. S. 899 (1943).
86. 62 Fed. S. 91 (1945). In accord. Goodrich v. U. S. 146 Fed. (2d) 265 (1945); McGraw v. U. S., 156 Fed. (2d) 539 (1946). Canadian case also in accord. Rex v. Lauzon, 79 Can. Cr. C. 312 (1942).

dren, in which it has been held that a conviction of a father for refusing to support his children is not a bar to a later prosecution for a future neglect. . . . The obligation of a citizen to support his government in time of war is entitled to the highest rank of personal obligation."

(2) **Vested classification.**—In U. S. v. Domres,[87] the defendant, age twenty-one, was a laborer in a paper mill. He claimed that he was a Jehovah's Witnesses minister. Accordingly, the draft board classified the defendant as a minister, but later it reclassified him as 1A. In upholding the right of the draft board to reclassify a registrant, the court stated that "once the (Draft) Board has classified a registrant, it does not lose its power to reconsider and reclassify him, even though the registrant may have been classified as a minister and because of such classification entitled to exemption. The fact that he is, when classified as a minister exempt, does not mean that his classification is determined for all time. Like any other registrant, his classification is subject to reconsideration. It is the duty of the Board to keep up the screening and sorting process of reclassification. No one has a vested right to remain in the classification in which he is once placed." Thus one who has been classified as a minister, divinity student or conscientious objector by his local draft board does not have a vested right to such classification, but it is subject to a later reclassification of such draft board.

(3) **Involuntary servitude.**—In Heflin v. Sanford,[88] a conscientious objector refused to report to a civilian public service camp. His defense was that the work done at such camp by conscientious objectors is prohibited by the Federal Thirteenth Amendment. In overruling this defense, the court averred that "during the First World War convictions for refusing army service were attacked as a violation of this Amendment. The contention was overruled without being dignified by being argued. Arver v. U. S., 245 U. S. 366. . . . The service required here is 'work of national importance,' that is to say it is of public nature. It is in lieu of army service which might have been required of appellant, the

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87. 142 Fed. (2d) 477 (1944).
88. 142 Fed. (2d) 798, 800 (1944).

substitution being allowed as of grace because of conscientious objections to military service. The present war is described by its authors as 'total war,' meaning that every means of destruction will be used, and men, women and children alike killed. It means also that total effort may be necessary to resist it, men, women and children all doing what they can. Such a total call has not yet been made by the United States, but is within its power under those parts of the Constitution which authorize Congress to declare war and raise and equip armies. There can be no doubt whatever that Congress has the constitutional power to require appellant, an able-bodied man, to serve in the army, or in lieu of such service to perform other work of national importance. The Thirteenth Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need."

(4) **Trial by jury.**—Only a registrant, who has exhausted his administrative remedies under the Act, can test his draft classification by a jury trial.[89] Those registrants who have not done so are not entitled to such privilege when being tried for a violation of the Draft Act, because the "Selective Training and Service Act was intended and designed by Congress to provide men for the armed forces without delay. This does not mean that the Constitution was suspended for the duration of the emergency, but that the condition which faced the United States at the time the act was passed must play a cogent part in determining any question relating to its constitutionality. The means embodied in the Act for raising of armed forces for the national defense bear a real and substantial relationship to the danger which had materialized with great rapidity upon the horizon of our national life. . . . If as the appellant contends, the classification of every registrant is to be submitted to trial by jury under a plea of not guilty to an indictment, the validity of classification in many instances could not be settled until their determination by the United States Court of Appeals and in some cases by the Supreme Court itself. Every registrant who desired to avoid military service would avail himself of a right to test his classifi-

89. Ch. III, B. 2, d.

cation by a jury trial. Interminable delays would ensue inevitably and the equality of the service and sacrifice contemplated by Congress when it passed the Act would be destroyed. We entertain no doubt that this was the reason Congress saw fit to embody in Section 10 the flat statement that the decisions of the local boards should be final, subject to appeals provided by the statute, and did not see fit to interpose between the registrant and the selective service agencies express provision for a judicial review."[90]

**(5) Forced Labor Without Compensation.**—"It is urged that the (Draft) Act violates the Fifth Amendment in that it exacts forced labor without compensation. Petitioner here is not 'deprived of life, liberty, or property, without due process of law' nor is his 'private property' taken. If Congress can conscript for combatant military service, without compensation, and it can, . . . it can conscript for work of national importance without compensation. Counsel for the petitioner depicts the condition of the groups of conscientious objectors in the various camps as bordering on the lowest type of slavery. Even be it so, it is not to be compared with the condition at the time of the men on the battle fronts, coupled as it is with the immediate danger of loss of limb or life. The conscientious objector may well be pleased that he is secure from the danger of war, if he can satisfy his own sense of loyalty in his attitude."[91]

**(6) Constitutional Religious Freedom.**—Whenever a pacifist, be he a conscientious objector, a Quaker, Jehovah's Witnesses or a member of any of the other pacifist cults, is prosecuted for a violation of the Federal Draft Act, the defense of constitutional religious freedom is generally raised. On this point, however, the law is well settled that although government may not interfere with religious beliefs and opinions,[92] it can prohibit and punish religious practices which are criminal offenses.[93] Since a violation of the Draft Act is a criminal offense,[94] it can readily be seen that a pacifist, whose

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90. U. S. v. Pitt, 144 Fed. (2d) 169 (1944).
91. U. S. v. Osborne, 54 Fed. S. 984, 998 (1944).
92. A belief in pacifism by an American citizen is not unlawful. State v. Hutterische Bruder Gemeinde, 46 S. D. 189, 191 N. W. 635 (1922).
93. Davis v. Beason, 133 U. S. 333, 342-3 (1889); Reynolds v. U. S., 98 U. S. 145, 167 (1878). Ch. I, footnote No. 127.
94. Ch. III, B, 1, (4), (5), 2, a, b, c.

practices make him guilty of such offense, cannot claim the defense of constitutional religious freedom.[95]

**C. Civil Aspects. In General.**—The civil aspects of this question are six-fold. The first pertains to student pacifists who seek to matriculate at a state university which has compulsory military training for its students. The second concerns itself with soldier pacifists who seek a discharge from the Army. The third deals with the lawfulness of a pacifist religious corporation. The fourth pertains to the right of a State to bar pacifists from a licensed profession, trade, public office or position. The fifth deals with the right of a private employer to discharge a pacifist employee. The sixth covers alien pacifists who seek American citizenship.

**1. State University Student Pacifists.**—In the significant case of Hamilton v. Regents of the University of California,[96] the facts were as follows: The University of California is a Federal land grant college. As such, it came under the benefits of the Federal Morrill Act of 1862. This Act donated public lands to the several states for the endowment and support of state universities, which by its provisions, were encouraged to teach military science and tactics, besides the usual professional, scientific and classical subjects. Accordingly, the University of California required as a condition precedent to the matriculation of male students the inclusion in their course of the subjects of military science and tactics of the Reserve Officers' Training Corps as prescribed by the War Department which covered rifle marksmanship, scouting, drill and combat principles. The War Department furnishes the instructors, arms, equipment and uniforms to the students. The appellant, a minor, is a devout member of the Methodist Episcopal Church. He enrolled as a student at the University of California, and presented a petition to the University in which he requested exemption from military training upon the grounds that it was against his religious convictions. The University rejected his petition. Thereupon, he had mandamus proceedings instituted against the University to compel his re-admission as a student. The issues raised were whether the University's requirement of compulsory military training for its students violated the special

95. Ibid.
96. 293 U. S. 245 (1934).

privileges and immunities under the Fourteenth Amendment of the Federal Constitution, and also whether it was repugnant to the First Amendment which guarantees religious freedom. In upholding the suspension of the appellant by the University of California, the Supreme Court of the United States declared: "The First Amendment, if it be read into the Fourteenth, makes invalid any state law 'respecting an establishment of religion or prohibiting the free exercise thereof.' Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training. . . . Every State has the authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States Army or in the state militia (always liable to be called forth by the Federal authority to execute the laws of the Union, suppress insurrection or repel invasion) . . . or as members of a local constabulary forces, or as officers needed effectively to police the State. And, when made possible by the national government, the State in order more effectively to teach and train its citizens for these and like purposes, may avail itself of the services of officers and equipment belonging to the military establishment of the United States. . . . The State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. . . . Government, federal and state, each in its own sphere owes a duty to the people within its jurisdiction to preserve itself in adequate strength to maintain peace and order and to assure the just enforcement of law. And every citizen owes the reciprocal duty, according to his capacity, to support and defend the government against all enemies."

In a case,[97] which is almost identical with the facts of the Hamilton case, and which concerned the University of Maryland, the Court of Appeals of Maryland also upheld the suspension of a student pacifist for similar reasons: "The Court, we think, would be going very far should it encourage this or like (pacifist) societies, or

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97. Pearson, University of Maryland et al v. Coale, 165 Md. 224, 167 Atl. 54 (1933). On appeal to the Supreme Court of the United States, this case was dismissed for want of a substantial federal question. 290 U. S. 597 (1933).

persons with similar views, in their interference with the constituted authorities in the management and control of colleges and universities when acting upon authority duly and lawfully conferred upon them. Or to give encouragement to such (pacifist) societies or persons to interfere with the government in all lawful efforts to keep the country in a state of preparedness for war so long as the nations of the world continue to settle their disputes by means of war. A great majority of the people in this country are opposed to war, but unlike those of whom we have been speaking, they recognize the necessity of being prepared for war when it comes upon us. In preparing for defense, a military training for those who may be called upon to take arms in defense of their country is a necessary incident thereto, and any effort on the part of any people to hinder or defeat the government in doing so should not be countenanced by the courts."

**2. Soldier Pacifists.**—In the unusual case of McCord v. Page,[98] the plaintiff had enlisted voluntarily in the United States Army during peacetime. Later, while serving his enlistment, he claimed that he had become an ordained minister in the Watch-Tower Bible and Tract Society. He claimed that the tenets of his religion were incompatible with certain of his military duties and also did violence to his religious convictions. The military duties which he particularly complained of were his duty to salute his superior officers and the American flag. He had habeas corpus proceedings instituted in the federal court to obtain his discharge. In denying the writ, the court stated: "Military regulations requiring a soldier to salute his superior officers and his flag are not intended to interfere with religious liberties, and the enforcement of the regulation by a proper military tribunal does not violate the Constitution of the United States. . . . No invalidity in the enlistment is claimed, and an enforceable contract between the soldier and the United States was created thereby. He was fully aware of the duties and the responsibilities he thereby assumed, and from which he now asks to be released. Uniquely essential to successful military operations, 'no question can be left open as to the right to command in the officer, or the duty of obedience in the soldier'." Although the

98. 124 Fed. (2d) 68 (1941).

Federal Draft Act was not in issue here as the enlistment was voluntary and in peacetime, this case lays down the general rule of law that during peacetime when a person enlists in the United States Army or Navy, he is under a contractual legal duty to serve out the term of his enlistment, notwithstanding his subsequently acquired pacifist beliefs. This ruling is particularly applicable to draftees during times of war, who subsequently after their induction become adherents of a pacifist cult. Thus in World War II, habeas corpus was denied to soldiers who after considerable service sought discharge as a minister or divinity student or reclassification as a conscientious objector.[99]

3. **Pacifist Religious Corporation.**—In State v. Huterische Bruder Gemeinde,[100] the State of South Dakota filed quo warranto proceedings against the defendant, a religious corporation, to have it dissolved as a corporation. The evidence showed that the defendant corporation is engaged in agricultural activities in four counties in South Dakota, together with stock raising and such incidental manufacturing as milling, blacksmithing, etc. for the use of its members only. The corporation is composed of men and women who are associated together in a quasi-communistic combine in carrying on their livelihood and their Christian religion, education and worship. They take care of their own sick and aged. Its original members came from Germany in 1874. Since then, and to the present day, it has held and used all of its real and personal property in common according to the word of God as revealed to them in their religious teachings. As part of their religion they believe in farming and in the cultivation of the soil from which they derive their support. All of the property is held by the defendant corporation in trust for the common benefit of its members. The corporation was established in 1905. Its original incorporators, two hundred and two in number, were members of a sect, commonly known as Mennonites, and were conscientiously opposed to war. The fundamental doctrine of this church is that they obey the tenet of non-

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99. Sandford v. Callan, 148 Fed. (2d) 376 (1945); Mayborn v. Heflebower, 145 Fed. (2d) 864 (1944); Hibbs v. Catovolo, 145 Fed. (2d) 866 (1944); Miller v. C. O., Camp Bowie, Texas, 57 Fed. S. 884 (1944); U. S. v. Mellis, 59 Fed. S. 682 (1945). Ch. III, B, 2, c.

100. 46 S. D. 189, 191 N. W. 635 (1922).

resistance. During World War I, they refused to subscribe to any Liberty Bonds in aid of war or to any war aids or take part in the defense of the United States in its war against Germany, either by bearing arms or wearing any military uniform. In upholding the lawfulness of the defendant corporation, the Supreme Court of North Dakota pointed out that its members are clearly within the exemption as conscientious objectors as provided by the Federal Draft Act of 1917, and that such pacifist belief against war does not constitute any violation of any federal or state law, and that the corporation, because of its pacifistic nature, is not against public policy. In substance, the ruling in this case is that a pacifist religious corporation is not unlawful.

**4. State's Right to Bar a Pacifist from a Licensed Profession, Trade, Public Office or Position.**—In Re Summers,[101] the petitioner had been classified as a conscientious objector under the 1940 Federal Draft Act. He is opposed to the use of force either for offensive or defensive purposes. The taking of human life under any circumstances he believes to be against the law of God. He would if he could obey to the letter of the law the following precepts of Christ: "Love your enemies; Do good to those that hate you; Even though your enemy strike you on your right cheek, turn to him your left cheek also." The petitioner has complied with all the prerequisites for admission to the bar of the State of Illinois, except that he has not obtained the certificate of the Committee on Character and Fitness. This Committee has declined to sign a favorable certificate for the petitioner upon the grounds that he is a conscientious objector. He filed a petition with the Supreme Court of Illinois[102] setting up the aforementioned facts, and claimed that such exclusion violated the First and Fourteenth Amendments to the Federal Constitution. His petition was denied by the Illinois Supreme Court upon

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101. 325 U. S. 561 (1945).

102. The Supreme Court of Illinois has the sole power and jurisdiction of admissions of attorneys to practice law in Illinois. In the exercise of its judicial power over the bar, the Illinois Supreme Court has adopted rules for the admission to practice before the courts of Illinois, which also permit admission by the Supreme Court after a satisfactory examination by the Board of Law Examiners which include a certification by a Committee on Character and Fitness as to the applicant's character and moral fitness.

the ground that he was unable to take in good faith the required oath to support the Constitution of Illinois, because Illinois has constitutional provisions which require service in the militia in time of war of men in the petitioner's age-group. The Illinois Court further stated that the petitioner's good citizenship when judged by the standards which are required for practicing law in Illinois is not satisfactorily shown as the Illinois law requires that all lawyers must take the oath to support the state constitution, and that a conscientious belief, such as the petitioner has in non-violence, prevents him from swearing that he will support the Constitution of the State of Illinois, and must therefore disqualify him for admission. In affirming the denial of the petition, the Supreme Court of the United States declared: "While under # 5(g) of the Selective Training and Service Act . . . conscientious objectors to participation in war in any form are now permitted to do non-war work of national importance, this is by grace of Congressional recognition of their beliefs. Hamilton v. Regents, 293 U. S. 245, 261-65, and cases cited. The Act may be repealed. No similar exemptions during war exists under the Illinois law. The Hamilton decision was made in 1934, in time of peace. This decision as to the powers of the state government over military training is applicable to the power of Illinois to require military service from her citizens. . . . It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois' interpretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action." In his dissenting opinion, Justice Black stated that the "conclusion seems to me inescapable that if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than in force. For a lawyer is no more subject to the call of military duty than a plumber, a highway worker, a Secretary of State or prison chaplain." Thus under the ruling of the Summers case, a state may bar a pacifist from a licensed profession, trade, public office or position, particularly during times of war.

The Summers ruling is particularly applicable to public school teachers. In McDowell v. Board of Education,[103] which occurred in World War I, the petitioner is a Quakeress. She was a high school teacher in a New York public school. She is "opposed to all war, offensive and defensive. . . . She would not uphold this country in forcibly resisting invasion; she did not want to help the government of the United States in carrying on the present war; she would not urge her pupils to support the war . . . (or) to perform Red Cross services, which better the conditions of soldiers in the field; she would not urge her pupils to buy thrift stamps; she does not believe a teacher is under a special obligation to train her pupils to support the government of the United States in its measures for carrying on the war; and she is opposed to the present war against the German Government." The petitioner was discharged for conduct unbecoming a teacher. She filed a petition for a writ of mandamus for reinstatement. In denying her petition, the New York court averred that the "contention that the petitioner, in spite of her views, may still be able to do her full duty as a teacher in the class room cannot be upheld. The grounds of removal contemplated by the statute may in a given instance be wholly unrelated to the discharge of the scholastic duties, and a teacher may be both incompetent and inefficient, even though her class shows most gratifying results in the ordinary subjects of the curriculum. It is of the utmost importance to the state that the association of teacher and pupil should tend to inculcate on the latter principles of justice and patriotism and a respect for our laws. This end cannot be accomplished if the pupil finds his teacher unwilling to submit to constituted authority. It is further argued that . . . there was a violation of the federal and state constitutions, in that she was discriminated against on account of her religion, and, that there was an attempted restraint upon the observance of the Quaker faith. Such is not the case. The petitioner was not dismissed because she is a Quakeress. It has simply been found that certain views and beliefs, which she declares are based upon her religion, prevent her from properly discharging the duty she assumed. When a person agrees with the state to perform a public duty, she will not be excused from performance accord-

103. 172 N. Y. S. 590 (1918).

ing to the law merely because her religion forbids her doing so. While the petitioner may be entitled to the greatest respect for her adherence to her faith, she cannot be permitted because of it to act in a manner inconsistent with the peace and safety of the state."

In a similar case,[104] which involved a public school teacher in World War II, the defendant was a teacher in a public high school in Florida. He is professionally qualified, experienced and industrious. He had been classified by his local draft board as a conscientious objector. He made a public written statement that he would not aid in any way the United States in its war against Germany, Japan and Italy, either as a combatant or non-combatant, and that he would not wear the uniform. The state statute makes it the duty of a public school teacher to labor faithfully for the advancement of the pupils in their duties and morals, and "embrace every opportunity to inculcate by precept and example the principles of truth, honesty and patriotism." In holding that the employment of the defendant was lawfully terminated upon the grounds of his incompetency as a teacher, the Florida court stated that the defendant's conduct and attitude "was not only inimical to the responsibilities of good citizenship, but his manifested ideals were detrimental to the minds of the student and the welfare of the public school system."

**5. Private Employer's Right to Discharge Pacifist Employee.**—A private employer, whether a corporation, trust, partnership or individual, may discharge an adult or minor employee, who registers as a conscientious objector and has been classified as such by the local draft board upon the ground that as a pacifist he is an undesirable employee.[105] However, in such cases where there is a deed of apprenticeship between such employer and minor employee, the law is theoretically otherwise, but from a practical standpoint, it is the same. This rule was enunciated in the English case of Newell v. Gillingham Corporation.[106] Here the plaintiff was bound by a deed of apprenticeship as a surveyor to serve the defendant corporation for a period of five years, expiring in 1941. The deed provided that the defendant could dis-

104. State v. Schweitzer, 155 Fla. 270, 19 So. (2d) 832 (1944).
105. Downsborough v. Huddersfield Industrial Society, 1 K. B. (1942) 306, 111 L. J. (K. B.) 145.
106. 1 All Eng. L. R. Antd. (1941) 552.

miss the plaintiff if he should grossly misbehave himself. The plaintiff registered under the Draft as a conscientious objector. In 1940, he was discharged by the defendant. The plaintiff brought an action to recover damages, alleging loss of wages and postponement of his opportunity to qualify as a surveyor. Because the plaintiff was twenty years old, and under age, and the contract of apprenticeship was still in force, the court held that the registration of the plaintiff as a conscientious objector was not such misconduct as would justify the termination of the apprenticeship, but that there was merely a technical breach of the covenant in the deed, and allowed the plaintiff only nominal damages of 5 pounds. In its reason for its decision, the court pointed out that the "plaintiff was a political conscientious objector . . . and not a true conscientious objector. . . . His conduct would be most irritating to his fellow workmen, and might lead to breaches of the peace and loss of the workmen's time. . . . He was pro-German. From what he said, the Germans were always right and we were wrong. . . . He was a defeatist. The government was always wrong. The Germans were going to win and we were going to lose. . . . His arguments were all based upon political considerations. . . . (He claimed that A.R.P. work was a dodge) to escape military service. An answer of that sort . . . shows the true character of the plaintiff. . . . (If the things said and done by the plaintiff were said and done by a grown man) it might be very well that the employers would be justified in putting an end to any contract of employment."

6. **Alien Pacifists.**—By its recent decision in the Girouard case,[107] the Supreme Court of the United States reversed its previous rulings that alien pacifists are barred from American citizenship,[108] and held that being

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107. Girouard v. U. S., 328 U. S. 61 (1946).

108. In the following cases, alien pacifists were denied American citizenship because they refused to give the absolute, unqualified and unconditional oath to "'support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to same." In U. S. v. Schwimmer, 279 U. S. 644 (1929), the applicant was a Hungarian woman who was well known as a linguist, lecturer and author; she stated that she would not take up arms for the defense of the United States, because she is an uncompromising pacifist with no sense of nationalism, but only a "cosmic consciousness of belonging to the human family." She was a humanitarian

a religious pacifist is not a ground upon which American citizenship will be denied to an alien. The facts in this case were these: In 1943, the petitioner, a native of Canada, filed his petition for American citizenship. In his application, he stated that he was willing to take the oath of allegiance of the New Nationality Act which reads: "I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic, and I will bear true faith and allegiance to same." To the question in his application, "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist." He explained his answer before the examiner by saying "it is a purely religious matter with me." He did not claim before his Selective Service Board exemption from all military service, but only from combatant military duty. At the hearing in the District Court, he stated that he was willing to serve in the Army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed this de-

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pacifist. In U. S. v. MacIntosh, 283 U. S. 605 (1931), the applicant was a Canadian who was an ordained Baptist minister and a teacher at Yale University; he asserted that he was willing to defend, with arms if necessary, the United States against all enemies, only when he judged it to be in the "best interests of my country, but only insofar as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support my country right or wrong." He could not place allegiance to the government of any country before allegiance to the "will of God," and he believed that he had the right to judge the necessity of the war. He was a partial or conditional religious pacifist. In U. S. v. Bland, 283 U. S. 636 (1931), the applicant was a Canadian and a nurse; she refused to take the oath except with the interpolation of the words "as far as my conscience as a Christian will allow." She was a partial or conditional religious pacifist. In Re Roeper, 274 Fed. 490 (1921), the petitioner had conscientious scruples against shedding human blood, even in war time, and declared he would be unwilling to render military service, if called upon to do so. In Clarke's Case, 301 Penn. 321, 152 Atl. 92 (1930), applicant desired to add to the oath the words "so far as they are in accord with the moral law of Jesus Christ." In Beale v. U. S., 71 Fed. (2d) 737 (1934), the applicant refused to state that he would take up arms in the defense of the United States, because he believed the Kellogg Peace Treaty was the supreme law of the land and he was conscientiously opposed to war. In Re Warketin, 93 Fed. (2d) 42 (1937), the petitioner was a member of the Mennonite Church whose main tenet is pacifism, and for this reason he claimed he could not take the required oath. In Re Appugliese et al, 58 Fed. S. 829 (1945), two Jehovah's Witnesses, one Congregazione Christian and one Seventh Day Adventist, all had conscientious objections to military service.

cision on the authority of the Schwimmer, MacIntosh and Bland cases. In an utter reversal of precedent, and in an emotional opinion, Justice Douglas declared that the "oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such findings as a prerequisite to citizenship. To hold that it is required is to read it into the (Naturalization) Act by implication. . . . Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article 6, Clause 3 of the Constitution provides that such officials, both of the United States and of the several States, 'shall be bound by Oath or Affirmation to support this Constitution' it significantly adds that 'no religious Test shall ever be required as a Qualification to any Office or public trust under the United States.' The oath required is in no material respect different from that prescribed for aliens under the Nationality Act. . . . There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. . . . Religious scruples against bearing arms have been recognized by Congress in the various draft laws. This is true of the Selective Training and Service Act of 1940 . . . as it was of the earlier acts. He who is inducted into the armed forces takes an oath which includes the provision 'that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever.' . . . Congress has thus recognized that one may adequately discharge his obligations as a citizen by rendering non-combatant as well as combatant services. This respect by Congress over the years for the conscience of those having religious scruples against bearing arms is cogent evidence of the meaning of the oath. It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war. That construction of the Naturalization Oath received new support in 1942. In the Second War Powers Act, 56 Stat. 176, 182, 8 U. S. C., Supp. IV, # 1001, Congress relaxed certain of the requirements for aliens who served honorably in the armed forces of the United States during World War II and provided machinery to

expedite their naturalization. Residence requirements were relaxed, educational tests were eliminated, and no fees were required. But no change in the oath was made; nor was any change made in the requirement that the alien be attached to the principles of the Constitution. Yet it is clear that these provisions cover non-combatants as well as combatants. If the petitioner had served as a non-combatant (as he was willing to do), he could have been admitted to citizenship by taking the identical oath which he is willing to take. Can it be that the oath means one thing to one who has served to the extent permitted by his religious scruples and another thing to one equally willing to serve but who has not had the opportunity? It is not enough to say that the petitioner is not entitled to the benefits of the new Act since he did not serve in the armed forces. He is not seeking the benefits of the expedited procedure and the relaxed requirements. The oath which he must take is identical with the oath which non-combatants and combatants must take. It would, indeed, be a strange construction to say that 'support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic,' demands something more from some than it does from others. The oath can hardly be adequate for one who is unwilling to bear arms because of religious scruples and yet exact from another a promise to bear arms despite religious scruples."

In a trenchant dissenting opinion, Chief Justice Stone asserted: "With three other Justices of the Court, I dissented in the MacIntosh and Bland cases for the reasons which the Court now adopts as ground for overruling them. Since this Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has likewise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the Schwimmer Case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization

laws. For that reason alone, I think the judgment should be confirmed."

In short, the Girouard Case lays down the general rule that an alien religious pacifist can become an American citizen.[109] However, this ruling does not apply to alien pacifists whose pacifism is predicated solely upon personal, political, [110] social,[111] economic, humanitarian[112] or philosophical grounds.[113]

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109. "The Girouard Case . . . holds that a refusal to take up arms in defense of the United States on purely religious grounds does not bar an applicant from citizenship." In re MacKay, 71 Fed. S. 397, 400 (1947).

110. Communists. In re Mackay, supra; In re Saralief, 59 Fed. (2d) 436 (1932).

111. Berman v. U. S., 156 Fed. (2d) 377 (1946).

112. U. S. v. Schwimmer, 279 U. S. 644 (1929).

113. U. S. v. Kauten, 133 Fed. (2d) 703 (1943).

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